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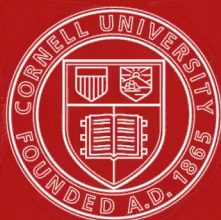
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**A selection of leading cases in criminal**



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A SELECTION  
OF  
LEADING CASES IN CRIMINAL LAW.

WITH NOTES

BY

*atch*  
EDMUND H. BENNETT AND FRANKLIN FISKE HEARD.

SECOND EDITION.

ENTIRELY REVISED AND PARTLY RE-WRITTEN.

VOLUME II.

BY

FRANKLIN FISKE HEARD.

BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1869.

1874.2

Entered according to Act of Congress, in the year 1869, by

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In the Clerk's Office of the District Court of the District of Massachusetts.

CAMBRIDGE:  
PRESS OF JOHN WILSON AND SON.

TO THE  
HONORABLE JOHN HENRY CLIFFORD, LL.D.,  
ATTORNEY GENERAL  
OF THE  
COMMONWEALTH OF MASSACHUSETTS,

THIS VOLUME IS DEDICATED

BY THE AUTHORS.



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# LEADING CRIMINAL CASES.

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COMMONWEALTH *v.* HART.<sup>1</sup>

March Term 1853.

## *The Pleading of Exceptions and Provisos in Statutes.*

Where there is an exception so incorporated with the enacting clause of a statute, that the one cannot be read without the other, then the exception must be negated. If the exception, by whatever phraseology indicated, is in a substantive clause, subsequent to the enacting clause, though it be in the same section, it is matter of defence to be shown by the defendants.

The St. 1852, ch. 322, § 12, contains only one exception in the enacting clause; namely, "without being appointed or authorized as aforesaid." At the end of the section, in a subsequent clause, is a proviso. An indictment which negatives the exception is sufficient.<sup>2</sup>

THE defendant was indicted at the January term of the municipal court of the city of Boston, 1853, under the twelfth section of the "Act concerning the manufacture and sale of spirituous or intoxicating liquors," St. 1852, ch. 322, which provides that "No person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly authorized and appointed as aforesaid (*i. e.* as provided in previous sections), on pain of forfeiting, on the first conviction, \$100 and the costs of prosecution; and three several sales of spirituous or intoxicating liquors, either to different persons or to the same person, shall be sufficient to constitute a violation of this section. *Provided*, that nothing in this act shall be construed to prevent the manufacture or sale of cider for other

<sup>1</sup> 11 Cushing, 130.

<sup>2</sup> And the words "not being then and there duly appointed and authorized therefor," is a sufficient allegation. *Commonwealth v. Roland*, 12 Gray, 132.

purposes than that of a beverage; or the sale and use of the fruit of the vine for the commemoration of the Lord's Supper."

The fourteenth section provides that, when liquors are seized under the provision of that section, the owner or keeper shall be summoned before the magistrate by whose warrant they were seized, "and if he fail to appear, or unless he shall prove that said liquors are of foreign production, that they have been imported under the laws of the United States, and in accordance therewith, that they are contained in the original packages in which they were imported, &c. they shall be declared forfeited," &c.

The indictment was as follows: "The jurors etc. present, that John Hart of Boston in said county of Suffolk, trader, on the second day of January in the year of our Lord eighteen hundred and fifty-three, at Boston aforesaid in said county of Suffolk, and on divers other days and times between the first day of December in the year of our Lord eighteen hundred and fifty-two, and the day of the finding, presentment, and filing of this indictment, there without any authority or license therefor as required by law, and not being authorized or appointed so to do, by or under any of the provisions of the statutes, passed in the year eighteen hundred and fifty-two, entitled, 'An act concerning the manufacture and sale of spirituous or intoxicating liquors,' did presume to be, and said John Hart then and there was a common seller of wine, brandy, rum, and other spirituous and intoxicating liquors in and about a building then and there used by him as a shop, sales-room, and place of business [and did then and on said other days and times, there, without any license, appointment, or authority to sell such liquors for any purpose, commonly sell spirituous and intoxicating liquors to divers persons, more than three in number, to wit, to one Patrick Hickey, to one Thomas Murphy, and to divers other persons, whose persons and names to said jurors as yet are not known]; against the peace," etc.

After a verdict of guilty in the court of common pleas, the defendant moved in arrest of judgment: "1. Because of duplicity; 2. Because there was no allegation of three several sales, as required by the statute to constitute a common seller; 3. Because there was no sufficient description of the person to whom the sales were made; 4. Because it does not appear that the liquors sold were not imported in original packages; 5. Because there is no allegation that the liquors sold were not cider for other purposes



than that of a beverage, or the fruit of the vine for the commemoration of the Lord's Supper." This motion was overruled by Hoar J. and the defendant excepted to the decision.

*J. H. Bradley*, for the defendant.

*J. C. Park*, County Attorney, for the Commonwealth.

METCALF J. The first objection taken to this indictment, that it is bad for duplicity, was waived at the argument. The second objection to the indictment is, that "there is no allegation of three several sales, as required by the statute to constitute a common seller." And it is argued for the defendant, that the sales alleged to have been made to Hickey, Murphy, and others, might have been made to them jointly, and not to each of them severally.

The 12th section of St. 1852, ch. 322, on which this indictment is framed, declares that "three several sales of spirituous or intoxicating liquors, either to different persons, or to the same persons, shall be sufficient to constitute a violation of this section." This, however, is only a declaration of the number of sales that shall constitute a common seller, and that evidence of three several sales shall be sufficient to convict a person of being such seller. The section does not require that an indictment shall allege three several sales. It makes no provision concerning the form of an indictment against a common seller. The old forms, therefore, which were held sufficient to charge a defendant as a common seller, under former statutes, are sufficient for the same purpose, under this. And it has been decided that an indictment for this offence, under those statutes, was sufficient, which set forth in the general words of the statutes, that the defendant was a common seller, without being duly licensed, and that additional allegations as to particular sales were needless, and might be treated as surplusage. *Commonwealth v. Pray*, 13 Pickering, 359. That decision which has been repeatedly recognized and sanctioned, is conclusive against the objection now under consideration; and we need not inquire whether three several sales are well alleged in this indictment. It was unnecessary to allege any particular sales; and the allegation of them may be rejected as surplusage. The other allegations constitute a sufficient indictment.

The third objection to the indictment is, "that there is no sufficient description of the persons to whom the sales were made." The reasons on which we overrule the second objection apply to this. The allegation of sales to any individuals being needless, it

is immaterial whether such allegation is sufficiently descriptive of the individual or not. It is surplusage, and is to be rejected as such.

The fourth objection is, that it does not appear in the indictment, "that the liquors sold were not imported in original packages." There is no legal ground for this objection. All that is said in the statute, concerning the original packages in which liquors are imported, is in section 14, which provides that when liquors shall be seized under the provisions of that section, they shall be declared forfeited and shall be destroyed, unless the owner or keeper can prove, among other things, that they are contained in the original packages in which they were imported. This provision has no reference to an indictment for selling liquor contrary to the statute.

The last objection to the indictment is, that "there is no allegation that the liquors sold were not cider for other purposes than that of a beverage," &c. The section on which this indictment is framed renders penal the offence of being a common seller of any spirituous or intoxicating liquors, without being duly appointed or authorized. Then several provisions are made as to the evidence that shall be sufficient to warrant a conviction of this offence, and as to including clerks, servants, &c. in the same indictment with the principal, and as to alleging two or more offences in the same complaint or indictment. The section closes with a proviso, "that nothing in this act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage," &c. This proviso extends to other sections besides that in which it is inserted; viz. to all the sections which prohibit the manufacture or the single sale of liquors.

The rule of pleading a statute which contains an exception is usually expressed thus: "If there be an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause or subsequent statute, that is matter of defence, and is to be shown by the other party." The same rule is applied in pleading a private instrument of contract. If such instrument contain in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party, relying upon the general clause, in pleading, may set out that clause only,

without noticing the separate and distinct clause which operates as an exception ; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it together with the exception. Gould Pl. ch. 4, §§ 20, 21. *Vavasour v. Ormrod*, 9 Dowling & Ryland, 597, and 6 Barnewall & Cresswell, 430. 2 Saunders Pl. & Ev. (2d ed.) 1025, 1026. The reason of this rule is obvious, and is simply this : Unless the exception in the enacting clause of a statute, or in the general clause in a contract, is negatived in pleading the clause, no offence or no cause of action appears in the indictment or declaration, when compared with the statute or contract. Plowden, 410. But when the exception or proviso is in a subsequent substantive clause, the case provided for in the enacting or general clause may be fully stated without negativing the subsequent exception or proviso. A *prima facie* case is stated, and it is for the party, for whom matter of excuse is furnished by the statute or the contract, to bring it forward in his defence.

In *Steel v. Smith*, 1 Barnewall & Alderson, 94, Bayley J. said : " When there is an exception so incorporated with the enacting clause, that the one cannot be read without the other, then the exception must be negatived." Our statute concerning the observance of the Lord's day, Rev. Sts. ch. 50, furnishes as plain an example of this rule of pleading as can be found. By section 1, " No person shall do any manner of labor, business, or work, except only works of necessity or charity, on the Lord's day." By section 2, " No person shall travel on the Lord's day, except from necessity or charity." Here the exception is in the enacting clause, and that clause cannot be read without reading the exception. In an indictment on either of these sections, it is doubtless necessary to negative the exception ; otherwise, the case provided for is not made out. Labor or travelling merely is not forbidden ; but unnecessary labor and travelling, and labor and travelling not required by charity. The absence of necessity and charity is a constituent part of the description of the acts prohibited, precisely as if the statute had, in totidem verbis, forbidden unnecessary labor and travelling, and labor and travelling not demanded by charity. All the cases in which this rule of pleading has been rightly applied, will be found, when examined accurately, to be just the same in principle. See *Whitwicke v. Osbaston*, 1 Levinz, 26 ; *Jones v. Axen*, 1 Lord Raymond, 119 ; *The King v. Jukes*, 8 Term R. 542 ;

Thibault v. Gibson, 12 Meeson & Welsby, 88, 94; Smith v. Moore, 6 Greenleaf, 274; Reynolds v. The State, 2 Nott & McCord, 365; The State v. Norman, 2 Devereux, 222; Teel v. Yellis, 4 Johnson, 304.

It is stated in several books that the exceptions in the enacting clause of St. 1 Eliz. ch. 2, § 14, need not be negatived in an indictment; and a case in Godbolt, 148, and another in 2 Leonard, 5, are cited, the last of which fully supports this statement. The reason for those decisions is not given in the reports; but we find that St. 29 Eliz. ch. 6, § 5, which was passed before those decisions were made, provided that an indictment on 1 Eliz. need not contain the averments which were omitted in those cases. 1 East P. C. 18. 1 Starkie Crim. Pl. (2d ed.) 176.

In the case of Attorney-General v. Sheriff, Forrest, 43, it was held that, after verdict, an information for the forfeiture of a ship and cargo, under the provisions of a statute, is sufficient, if *by necessary implication* a negative of an exception in the statute can be found upon the face of the information. See also Smith v. United States, 1 Gallison, 267.

The word "except" is not necessary in order to constitute an exception within the rule. The words "unless," "other than," "not being," "not having," &c. have the same legal effect, and require the same form of pleading. Gill v. Scrivens, 7 Term R. 27. Spieres v. Parker, 1 Term R. 141. The King v. Palmer, 1 Leach C. C. (4th ed.) 102. Wells v. Iggulden, 5 Dowling & Ryland, 19. Commonwealth v. Maxwell, 2 Pickering, 139. The State v. Butler, 17 Vermont, 145. 1 East P. C. 166, 167.

None of the cases in which indictments have been held bad for omission to negative exceptions in a statute, can be applied to this indictment founded on St. 1852, ch. 322, § 12, which enacts that "no person shall be allowed to be a common seller of spirituous or intoxicating liquors, without being duly appointed or authorized, as aforesaid" (by §§ 2-5), "on pain of forfeiting," &c. This is the enacting clause, which contains only one exception, namely, persons duly appointed or authorized; and that exception is negatived in this indictment. At the end of the section, in a subsequent clause, is a proviso as to the sale of cider, &c. According to the principle already stated, and according to the precedents, this proviso is matter of defence to be shown by the defendant.

There is a middle class of cases, namely, where the exception is not, in express terms, introduced into the enacting clause, but only by reference to some subsequent or prior clause, or to some other statute. As when the words "except as hereinafter mentioned," or other words referring to matter out of the enacting clause, are used. The rule in these cases is, that all circumstances of exemption and modification, whether applying to the offence or to the person, which are incorporated by reference with the enacting clause, must be distinctly negatived. *Verba relata inesse videntur.* The King *v.* Pratten, 6 Term R. 559. *Vavasour v. Ormrod*, 9 Dowling & Ryland, 597 ; 6 Barnewall & Cresswell, 430.

It is an elementary principle of pleading (except in dilatory pleas which are not favored), that it is not necessary to allege matter which would come more properly from the other side ; that is, it is not necessary to anticipate the adverse party's answer and forestall his defence or reply. It is only when the matter is such that the affirmation or denial of it is essential to the apparent or *primâ facie* right of the party pleading, that it must be affirmed or denied by him in the first instance.

The exceptions are overruled, and the case is to go back to the municipal court for further proceedings.

By a statute of Maine, if an executor, knowing himself to be appointed as such, shall not, within thirty days next after the testator's death, cause his will to be filed, &c. in the Probate Office, he shall upon such neglect, "without just excuse made and excepted by the judge of probate for such delay," forfeit a sum not exceeding sixteen dollars per month. On a judgment against an executor for the penalty imposed by this statute, he sued out a writ of error ; and the principal error assigned was "that in the declaration it was not alleged that the original defendant had neglected to file the will without just excuse made and accepted by the judge," &c. The court reversed the judgment, for this cause. Indeed it was impossible for them to do otherwise. But the opinion, given on this point, commenced with these remarks : "There is some perplexity and contradiction in the books respecting the principles to be applied in the decision of the question, in this and many other cases somewhat similar. There seems to be much curious learning, and many nice and shadowy distinctions, the sound reason and solid sense of which are not very easily discoverable." *Smith v. Moore*, 6 Greenleaf, at p. 277. The surprise, excited by this exordium, has induced a review of the doctrine discussed in that case ; and this review has only increased that surprise. If there are any legal principles which are free from perplexity, or any settled legal distinctions which rest on solid sense and sound reason, surely they lie in the very path which the court must have travelled in arriving at their conclusion in *Smith v. Moore*.



The rule of pleading a statute, which contains an exception or proviso, is usually thus expressed in the books, viz.: "If there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause, or subsequent statute, that is matter of defence, and is to be shown by the other party."

The same rule is uniformly applied in pleading private instruments of contract. Accordingly, Lord Tenterden places statutes and contracts together. In *Vavasour v. Ormrod*, 9 Dowling & Ryland, 599; 6 Barnewall & Cresswell, 432, he thus states the doctrine: "If an act of Parliament, or a private instrument, contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it; a party, relying upon the general clause in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception."<sup>1</sup>

When a party professes to recite a statute or private instrument, in pleading, and omits an exception in the "general clause," there is a variance. When he counts on a statute and attempts to bring a case, whether civil or criminal, within the "general clause," if he omits to negative the exception, he shows no cause of action, or no offence, within the statute. The principle is the same in both instances. That this rule, as to counting on statutes, stands on solid sense and sound reason, and that there is no perplexity in the principle of it, is easily shown by a very few cases which illustrate its application.<sup>2</sup>

The statute 19 Geo. II. ch. 30, § 1, enacts that no mariner, who shall serve on board any privateer, &c. employed in the British sugar colonies in the West Indies, nor any mariner being on shore in said colonies, shall be liable to be impressed by any officer of a ship of war, *unless* such mariner shall have before deserted from an English ship of war. A penalty of £50 is given by the same statute, to any person who shall sue therefor, against any officer who shall impress a mariner contrary to its provisions. In an action on this statute against an officer for impressing a mariner, judgment was arrested, because the declaration did not allege that the mariner had not previously deserted from any of his Majesty's ships of war. *Spieres v. Parker*, 1 Term R. 141. If, however, the statute had, in the enacting or general clause, merely imposed a penalty for impressing a mariner in the sugar colonies, and then had added a proviso that the act should not extend to mariners who had deserted from a ship of war, it would not have been necessary to negative, in the declaration, the mariner's former desertion. That would have been matter to come from the other side.

<sup>1</sup> "The difference is, where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to show the proviso." Treby C. J. in *Jones v. Axen*, 1 Lord Raymond, at p. 120. 7 Term R. 81. 4 Johnson, 306.

<sup>2</sup> "It is not always easy," said Hoar J. in a very recent case, "to determine to which class, whether of provisos or exceptions, a particular stipulation belongs; and this one is certainly very near the line." *Sobier v. Norwich Fire Insurance Co.* 11 Allen, 386, 388.

As the enacting clause stood, the penalty was not given for impressing a mariner in the sugar colonies, but for impressing a mariner there who had not previously deserted from a ship of war. The word *unless*, in the statute, had precisely the same sense and operation, as if it had been, in so many words, enacted that the penalty should be inflicted on any officer who should impress a mariner who had not previously deserted. The impressed mariner's not having deserted, entered into the very description, and constituted a part of the transaction made penal by the statute.

The case of *Gill v. Scrivens*, 7 Term R. 27, stands on the same principle. Lord Kenyon there comprises the whole doctrine in a single sentence, — "the writ ought to state all those circumstances that entitled the plaintiff to the execution prayed by him." So in the case of the impressed mariner, Lord Mansfield very briefly gave the whole matter, — "the plaintiff must aver a case which brings the defendant within the statute." A statute of Massachusetts forbids labor and travelling on the Lord's day, *except* from necessity or charity. Labor or travelling, merely, is not forbidden; but unnecessary labor and travelling, and labor and travelling not required by charity. The exception is in the enacting clause, and the absence of necessity and charity is a constituent part of the description of the acts prohibited; exactly as if the statute had, in totidem verbis, forbidden unnecessary labor, &c. and labor, &c. not demanded by charity. The *State v. Barker*, 18 Vermont, 195. The third section of the same statute forbids inn-keepers, &c. to entertain, on the Lord's day, the inhabitants of the towns where inns are kept, "not being lodgers" in the inns. An indictment on this section was held to be bad, because it did not aver that the persons entertained were not lodgers. *Commonwealth v. Maxwell*, 2 Pickering, 139. *Rex v. Dove*, 3 Barnewall & Alderson, 546. See *Commonwealth v. Tuck*, 20 Pickering, 362, 363. An English statute makes it penal for any person, "other than the persons employed in his Majesty's mint," &c. to make or mend any instrument for coining. This exception must be negated in an indictment. "The want of such authority is part of the description of the offence itself." 1 East P. C. 167. So the omission of an executor to file the will of his testator was not the penal matter; but his *unexcused* omission. *Smith v. Moore*, 6 Greenleaf, 274.

These few examples are sufficient to illustrate the meaning and the reason of the rule above stated. The reason is simply this, viz. that unless an exception in the enacting clause is negated in pleading the clause, no offence, or no cause of action, appears in the indictment, or in the declaration, or no defence on the face of the plea. The case provided for, in the clause pleaded, is not made out on the record. But when the exception or proviso is in a subsequent substantive clause of the statute, the case provided for in the enacting clause may be fully stated, without negating the subsequent exception or proviso. A *prima facie* case is stated; and it is for the party, for whom matter of excuse is furnished by the statute, to bring it forward in his defence.

It is among the rudimental principles of pleading, that it is not necessary to allege matter which would come more properly from the other side; that is, it is not necessary to anticipate the adverse party's answer, and forestall his defence or reply. "Tis like leaping," as Hale C. J. said, "before one come to the stile." 1 Ventris, 217. Thus, it is unnecessary in declaring on a bond, to negative the

performance, by the defendant, of its conditions; and so of all other matters of defeasance. It is only when the matter is such, that its affirmation or denial is essential to the apparent, or *prima facie*, right of the party pleading, that it must be affirmed or denied by him in the first instance. See *Bunbury*, 177; *Espinasse on Penal Statutes*, 95; 1 *Chitty Crim. Law*, 284; *Stephen Pl.* 350, 352; *Williams v. Hingham Turnpike*, 4 *Pickering*, at p. 345; *Gould Pl.* 178 et seq.; *Purcell Crim. Pl.* 47.

There are two cases in the old books, which, if not investigated, appear to contradict the rule above mentioned. The statute 1 *Eliz. ch. 2, § 14*, directs that every person "inhabiting within the realm," &c. shall diligently and faithfully, "having no lawful or reasonable excuse to be absent," endeavor themselves to resort to their parish church, &c. upon every Sunday, &c. upon pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit, for every such offence, 12*d.* to the use of the poor of the same parish. In *Ann Mannock's Case*, *Godbolt*, 148, it was decided that it was not necessary to allege, in an indictment on this section of the statute, that the defendant inhabited within the realm, &c. No reason is assigned, except "that if it were otherwise, it ought to be shewed on the defendant's part." In *Elizabeth Dormer's Case*, 2 *Leonard*, 5, it was held not to be necessary to allege, in the indictment, that the defendant had no lawful or reasonable cause to be absent. It was said, the excuse should come from the defendant. And it is asserted in some of the books of most frequent reference, that under the statute 1 *Eliz. ch. 2*, it is not necessary to negative the exceptions in the enacting clause. *Bacon Ab. (Gwillim's ed.) Heresy, D. 7* in the margin. *Bacon Ab. Indictment, H. 3.* 1 *Hawkins P. C. (Curwood's ed.)* 373. 2 *Id.* 343. 1 *Chitty Crim. Law*, 283, 284.

It will be found, however, that by statute 29 *Eliz. ch. 6, § 5*, passed before the decisions in *Godbolt* and in *Leonard*, "the indictment of every such offender," against the statute 1 *Eliz. ch. 5, § 14*, "*mentioning the not coming of such offender to the church of the parish, &c. shall be sufficient in the law*; and that it shall not be needful to mention in any such indictment, that the party offending was or is inhabiting, &c." But if it shall happen any such offender then not to be within this realm, &c. that in such case the party shall be relieved by plea to be put in, in that behalf, and not otherwise."

It is very clear, that although the statute not only warranted but required the two decisions above stated, yet that neither Sergeant Hawkins, nor his late editor, nor the compiler nor editor of *Bacon's Abridgment*, had any knowledge of it. Some eminent modern Judges, English as well as American, seem also not to have been aware of its existence. Mr. Justice Buller, in particular would not have invoked 2 *Hawkins's Pleas of the Crown*, 243, to the aid of *Baxter's Case*, hereafter to be noticed, if he had known or recollected this statute. See 1 *East P. C.* 18; 2 *Chitty Crim. Law*, 20 note *d*; 1 *Starkie Crim. Pl.* (2d ed.) 176; *The State v. Barker*, 18 *Vermont*, 198.

There are also two decisions, made by the twelve Judges in England, which, at first view, may seem to contradict the rule that requires exceptions in an enacting clause of a statute, to be negatived in pleading. The statute 48 *Geo. III. ch. 129*, now repealed, enacted that every person who should steal money, goods, &c. from the person of another, "without such force or putting

in fear as is sufficient to constitute the crime of robbery," should be liable to be transported.

In *Rex v. Pearce, Russell & Ryan* C. C. 174, and in *Rex v. Robinson, Russell & Ryan* C. C. 321, the Judges held that it was neither necessary nor proper, in an indictment on this statute, to negative the force and putting in fear; that the words, "without force," &c. were to be understood *not charged to be done with force, &c.* If the force, &c. had been negatived, *proof* of force, &c. would have entitled the defendant to acquittal, and he would have been detained for presentment on a charge of robbery; and if convicted of robbery, he must have been sentenced to execution, instead of transportation. Under this construction of the statute, it is obvious that the doctrine above considered was not impugned by these decisions; and doubtless the true intentions of Parliament, as to the mitigation of punishment, were thereby effected.

The case of *Rex v. Baxter*, 2 East P. C. 781; 2 Leach C. C. (4th ed.) 578; 5 Term R. 83, is less easily brought within the established principle that regulates the negativing of exceptions. By statute 22 Geo. III. ch. 58, "In all cases where any goods or chattels shall have been feloniously taken or stolen (*except* where the person actually committing the felony shall have been already convicted of grand larceny, or some greater offence) every person who shall buy or receive any such goods or chattels, knowing them to have been so taken or stolen, shall be held and deemed guilty of, and may be punished for, a misdemeanor, and shall be punished by fine, &c. although the principal felon be not before convicted of the said felony, and whether he be amenable to justice or not."

Upon an indictment on this statute, it was held by a majority of ten of the Judges, in *Rex v. Baxter*, *ubi supra*, that it was not necessary to aver that the principal offender had not been convicted. And so the law is laid down in Archbold's *Criminal Pleading* (2d ed.) 155, and in 3 Chitty's *Criminal Law*, 959. Buller J. in giving their opinion, says (as a second ground for it, and the only one now in question), that if it were necessary to make such averment, "it would be merely stating a negative averment, which need not be proved by the prosecutor. Such a fact is matter of evidence to be proved by the defendant, and which, when proved by him, would entitle him to an acquittal."

This reason is neither satisfactory in itself, nor sustained by authority. If it be conceded that a prosecutor never need to prove a negative averment, *i. e.* that the burden of proof, in such case, is always on the defendant; yet this is no excuse for omitting such averment, when that averment is necessary to show a cause of action, or ground of accusation, described in a statute. But such a concession is not required by the authorities. In criminal and in civil proceedings, it often lies on him, who asserts a negative fact, to prove it. In criminal proceedings, especially, the mere legal presumption of innocence frequently makes a *prima facie* case for the defendant, and drives the prosecutor to prove the negative. See 2 Gallison, 499; 1 Bosanquet & Fuller, 468; 1 Carrington & Payne, 538; 5 Maule & Selwyn, 206; 1 Hawkins P. C. (Curwood's ed.) 242; Archbold *Crim. Pl.* (2d ed.) 68; 2 Russell on Crimes (2d ed.) 673, 691, 694; 3 Russell on Crimes (4th ed.) 276 et seq.

Besides, does not the very rule, which requires exceptions to be negatived, of course import the necessity of making negative averments? And are not all the

cases hereinbefore cited in illustration of the rule, examples of the fatal effect of not "stating a negative averment?" See 1 Starkie Crim. Pl. (2d ed.) 172. Perhaps some of the remarks that fell from the court in *United States v. Smith*, 1 Gallison, 261, were not so carefully weighed as they would have been, if the case had turned on the point here considered. The *decision*, in that case, no one will question.

If then Buller J. had assigned no better reason than this, for the decision in *Rex v. Baxter*, or if no better reason could be assigned, the law of that case, it would seem, might safely be denied. Prior and subsequent decisions are directly against it. The case of *Rex v. Pollard*, 2 Lord Raymond, 1370, which was regarded in *Baxter's Case*, as a sufficient precedent, is so reported that no reason can be found for it, on the face of the report, except that previous indictments had been drawn in the same way. Sir M. Foster, in his *Crown Law*, 374, says of *Rex v. Pollard*, "the court would not, upon motion, arrest judgment upon an exception to the indictment, *which was never taken before*; and which must upset every judgment that had been given on the statute. This was a solid and a rational principle founded in political justice. For in cases of this kind, *communis error facit jus*." The passage in *Hawkins*, also relied on by Buller J. as has been before seen, utterly fails to support the doctrine for which it was cited.

Perhaps, however, a sufficient reason, not suggested by Buller J. may be found for the decision in *Rex v. Pollard* and in *Rex v. Baxter*. The cases and books, already cited, show that the reason why exceptions in an enacting clause should be negatived, is, that otherwise the record does not show that the act prohibited, &c. has been done. Furthermore, in *Rex v. Pemberton*, 2 Burrow, 1037, the court say, "where the words of a statute are *descriptive of the nature of the offence*, &c. there is a necessity to specify in the particular words of the statute." And in *Rex v. Jarvis*, 1 East, 647 note, Foster J. says, "where negatives are *descriptive of the offence*, there they must be set forth." Accordingly Starkie remarks "that in *Baxter's* and *Pollard's Cases* there was no necessity to call in aid so general a rule;" viz. that negatives need not be affirmed, "for there the offence consisted in receiving stolen goods, knowing them to have been stolen; and though the authority of the court to try the offenders depended upon the negative circumstance that the principal felons had not been convicted, the definition of the offence itself remained just as it was before, wholly clear from any negative description." 1 Starkie Crim. Pl. (2d ed.) 175, 176.

Some writers and Judges have been led into darkness and confusion by supposing "the enacting clause" to mean the "section" of the statute (as now divided into numerical parts), in which the matter is described and enacted. This is a misapprehension of the meaning of the terms. The only question, on this point of pleading, is, whether the exception is incorporated with the substance of the clause which defines the thing required to be done or omitted, or describes the qualification or authority of the person authorized or forbidden to do or to omit it, so as to constitute a part of the definition or description of the act, omission, or person. If the exception (by whatever phraseology indicated) is in a substantive clause, subsequent to the enacting or descriptive clause; or, as Lord Tenterden expresses it "in a separate and distinct clause;" it is matter



of defence, and to be shown by the other party, though it be in the same section, and even in the next sentence. Archbold Crim. Pl. (2d ed.) 26. Archbold Civil Pl. (American ed.) 159. Purcell Crim. Pl. 81. *Teel v. Fonda*, 4 Johnson, 304. *Rex v. Matters*, 1 Barnewall & Alderson, 362. *Steel v. Smith*, 1 Barnewall & Alderson, 94. In the last of these cases, Bayley J. says, "where there is an exception so incorporated with the enacting clause, *that the one cannot be read without the other*, then the exception must be negatived."

There is another source of no small confusion on this subject; viz. the distinction so often asserted to have been established between summary convictions, and indictments and declarations. But it will be more convenient to discuss that topic at the close of this note. Some intermediate matter may make the discussion less obscure in that place than in this.

A middle class of cases requires notice; namely, where the exception is not in express terms introduced into the enacting clause, but only by reference to some subsequent clause, or some prior statute; as where the words "except as hereinafter mentioned," or words of similar import, are employed. The rule, in these cases, is, that all circumstances of exemption and modification, whether applying to the offence or the person, that are incorporated, by reference, with the enacting clause, must be distinctly negatived. *Verba relata inesse videntur*. See *Rex v. Pratten*, 6 Term R. 559; *The State v. Palmer*, 18 Vermont, 570; 1 Starkie Crim. Pl. (2d ed.) 176; 2 Saunders Pl. & Ev. (2d ed.) 1025, 1026; 1 Paley on Convictions (Dowling's ed.) 114. *Southwell's Case*, Popham, 93, was decided differently. But it seems to have "had its day." It cannot stand with subsequent cases, unless, on the ground of a distinction between a *proviso* and an *exception*; which will presently be considered.

This rule is applied to private instruments, as well as to statutes. Indeed all the principles of the doctrine here discussed are entirely applicable to the pleading of contracts. The case of *Vavasour v. Ormrod*, 9 Dowling & Ryland, 597; 6 Barnewall & Cresswell, 430, was debt for rent. The declaration alleged that the defendant, by the indenture of demise, was to pay yearly a rent of £160. The indenture contained an engagement to pay that sum yearly, "except as hereinafter mentioned." There was also an engagement by the defendant to expend £600 in erecting a steam engine on the premises; and there was a subsequent proviso, that if the defendant should pay to the plaintiff £300, in part of the £600, within three years, the rent should be only £130 yearly. Lord Tenterden and his associates held that the matter of the proviso must be taken as part of the exception in the reservation of rent, and that the exception ought to have been negatived in the declaration; that it was introduced into the reservation, by reference to the subsequent matter in the indenture, "and must be considered as an exception in the general clause."

"There is a technical distinction between a proviso and an exception, which is well understood." Abbott J. in *Steel v. Smith*, 1 Barnewall & Alderson, at p. 99. Alderson B. in *Simpson v. Ready*, 12 Meeson & Welsby, at p. 740. This distinction, though often mentioned in the books, is not often explained. When the terms are used with technical precision, the distinction between them is perhaps this, to wit, an exception exempts, absolutely, from the operation of an engagement or of an enactment; a proviso defeats their operation, conditionally. An exception takes out of an engagement or enactment something

which would otherwise be part of the subject-matter of it; <sup>1</sup> a proviso avoids them by way of defeasance or excuse.<sup>2</sup> See 2 Lilly Ab. 493-496; Plowden, 361; Carter, 99 et seq.; 1 Saunders, 284 *a*, note. 5th ed.; 233 *b*. 6th ed.

If this be a correct notion, substantially, of the technical difference between these terms, it is manifest that they are seldom employed in their strict technical sense, in the discussion (whether by writers or Judges) of the doctrine here reviewed. It is equally manifest, that the true application of this doctrine depends, not on the *terms* that may be used in a statute or contract, but on the *effect* of those terms (according to established rules of legal construction) in the one or the other of the modes just mentioned. See 1 Lilly Ab. 559; Plowden, 363, 465; Sheppard's Touchstone, 82; 1 Term R. 645. It is obvious, also, that there are numerous instances, both in statutes and contracts, where the legal effect of the terms is neither that of an exception, nor of a proviso, technically taken; but of a qualification or modification only.

On advertng now to the accurate meaning of "enacting clause" in a statute, and "general clause" in a private instrument, it will readily occur to the reader, that a *technical* proviso will not be likely ever to be found in either. Such proviso is hardly consistent with such clauses. For the same reason, a technical *exception* will hardly be found in a "distinct or subsequent clause." If there are, or can be, any instances of such a position of such provisos and exceptions, then Mr. Day's rule, in a note to his edition of Chitty on Pleading, vol. 1, p. 229, may be as correctly expressed as it is correct in meaning. He says, "If the proviso furnishes matter of excuse for the defendant, it need not be negatived in the declaration, but he must plead it. In this point of view, it is immaterial whether the proviso be contained in the enacting clause, or be subsequently introduced in a distinct form. It is the nature of the exception, and not its location, which decides the point." The same is true, and on the same principle, of qualifications and modifications; as some of the cases, first cited in this note, conclusively show. If they are descriptive, they must be negatived; if excusatory, they need not be.

It remains to be inquired, with reference to the rule of negating matter incorporated with the enacting or general clause, by reference therein to matter elsewhere, whether there is any distinction between technical provisos and exceptions, that will save Southwell's Case, Popham, 93, above mentioned; whether, when the matter thus incorporated is an exception, it must be negatived; but need not be, when it is a proviso.

In *Rex v. Pratten*, 6 Term R. 559, the matter incorporated, by reference, with the enacting clause on which the information was founded, was an *exception* in a former section of the same statute; and it was decided that the exception in that section should have been negatived. In *Southwell's Case*, the matter thus incor-

<sup>1</sup> Logically speaking, an *exception* ought to be of that which would otherwise be included in the category from which it is excepted; but there are a great many examples to the contrary. Lord Campbell in *Gurly v. Gurly*, 8 Clark & Fennelly, at p. 764.

<sup>2</sup> The office of a *proviso* in a statute is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview. *Minis v. The United States*, 15 Peters, at p. 445.

porated was in a *proviso* in a subsequent section; and it was held that this proviso need not be negatived. Sergeant Hawkins, on the authority of this case, says, "There is no need to allege, in an indictment, that the defendant is not within the benefit of the provisos of a statute whereon it is founded; even as to those statutes, which in their purview expressly take notice of the provisos." 2 Hawkins P. C. ch. 25, § 113. And Chitty reaffirms the same position. 1 Chitty Crim. Law, 283.

Rex v. Pratten, 6 Term R. 559, was a case of conviction before magistrates, and Southwell's Case was an indictment. It will probably be seen, hereafter, that this diversity warrants no difference of decision on this point of pleading.

If matter referred to in the enacting clause is therewith incorporated and makes a part thereof, what is the difference in principle, whether that matter stand as an exception or as a proviso, in the other section or statute? Whatever it may be there, is it not technically an exception here? Or if not an exception, is it not a qualification or modification, which, as has been seen, must be distinctly negatived?

Several approved writers have already been cited (*ante*, pp. 13, 14), who make no mention of this distinction. See also 1 Saunders, 262 *a*, note 1. *Vavasour v. Ormrod*, 9 Dowling & Ryland, 597; 6 Barnewall & Cresswell, 430, was a case in which a proviso, or modification, in a distinct substantive clause, was held to be, by relation, an exception or modification in the general clause of a contract. And in *Steel v. Smith*, 1 Barnewall & Alderson, 94, which was an action for a penalty imposed by statute, the court fully recognized the same doctrine. Lord Ellenborough said: "There are not, in this case, any words of reference or of virtual incorporation, but this is a distinct and substantive proviso. On that ground, I think, it was not necessary for a plaintiff to notice it in his declaration." Abbott J. said: "Here are not in the enacting clause any words, such as 'except as hereinafter provided.' If any such words had been introduced, it might fairly have been contended that the subsequent proviso was incorporated with the enacting clause; and then the objection might have been supported." That the word "proviso" was here used in its strict technical sense, will be demonstrated by inspection of the statute on which this case was founded. See 1 Barnewall & Alderson, 97 in the margin.

In Massachusetts it has been held that there are a class of cases to which these principles do not apply. "The general principle is," says Dewey J. in *Larned v. Commonwealth*, 12 Metcalf, 241, 242, "that where, by statute or statutes, there is a gradation of offences of the same species—as in the various degrees of punishment annexed to the offence of malicious burning of buildings, or in the various grades of the offence of larceny, it is not necessary to set forth a negative allegation, alleging that the case is not embraced in some other section than that which, upon the evidence, may be found to apply in the case on trial, and by virtue of which the punishment is to be awarded. This subject was much considered in the case of *Commonwealth v. Squire*, 1 Metcalf, 258, and the principle was there fully stated. If, therefore, certain acts are, by force of the statutes, made punishable with greater severity, when accompanied with certain aggravating circumstances, thus creating two grades of crime, it is no objection to an indictment, that it changes the acts which constitute the minor offence, unaccompanied by any averment that the aggravating circumstances did

not exist. In such cases, the offence charged is to be deemed the minor offence, and punishable as such." *Commonwealth v. Wood*, 11 Gray, 85, 93. *Commonwealth v. Hamilton*, 15 Gray, 480.

The case of *Rex v. Marshall*, 1 Moody C. C. 158, is at variance with this doctrine. In that case it was held that an indictment is fatally defective which may apply to either of two different definite offences, and does not specify which. In Massachusetts, the doctrine is, as already stated, that it is not necessary to refer to the particular statute upon which the indictment is founded. This was directly adjudged in *Commonwealth v. Griffin*, 21 Pickering, 523. The question arose upon an indictment under the Revised Statutes, ch. 127, § 15. That section made the having of ten or more pieces of counterfeit coin in possession, with intent to pass the same as true, a criminal offence, and prescribed the punishment therefor. The sixteenth section of the same chapter made the having of less than ten pieces of counterfeit coin in possession, with intent to pass the same as true, a criminal offence, and prescribed the punishment therefor. Upon the trial of a case arising under the statute, the jury found the defendant guilty of having in his possession a number of pieces, less than ten, of counterfeit coin, with intent to pass the same as true; and it was contended that such finding did not support the indictment; the offence charged being under § 15, and the offence proved being under § 16. There, the argument was, that the party has a right to have his offence distinctly set forth. But it was held, that it was not necessary, in the indictment, to indicate the particular section, or the particular statute, upon which it is founded; that if the facts alleged in the indictment, and found by the verdict, show that the act done was a crime punishable by statute, it is sufficient to warrant the court in rendering a judgment.

But it is said there is a diversity to be noted, in applying the rules of pleading, to summary convictions before justices, and to indictments and declarations. It is asserted that in these summary processes, the utmost strictness is required in negating exceptions and provisos, in whatever part of the same or of an antecedent statute they may be inserted. There is nothing, perhaps, on which the books in most frequent use are less accurate, than on this point. Sergeant Hawkins says, "A conviction on a penal statute ought expressly to show that the defendant is not within any of its provisos; for since all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the court that the defendant had no such matter in his favor as the statute itself allows him to plead." Chitty lays down the same rule and gives the same reason for it. He asserts that "convictions upon penal statutes require in this respect" (the negating of exceptions, &c.) "much greater strictness than in indictments; for in general, it is necessary to show by negative averments, that the defendant is not within any of the provisos or exceptions of the statute. It has indeed been said, that where the proviso is subsequent to, and independent of, the enacting clause, it is unnecessary to negative its exceptions; but this seems contrary to the whole course of the decisions." 2 Hawkins P. C. ch. 25, § 113. 1 Chitty Crim. Law, 284-5. Bacon Ab. Indictment, H. 3.

Upon a scrutiny of the authorities, however, it is found that although Judges and writers have often asserted that there is a distinction between summary convictions and indictments, not only as to pleading, but also as to the statement of

the evidence and the negating of exceptions, &c. in the adjudication, yet that, at this day, this distinction is not acknowledged. See 1 Saunders, 262 *a*, note 1; *Rex v. Stone*, 1 East, 639. Sed vide also 1 Paley on Convictions (Dowling's ed.), 112, 123, 207, 208; Strange, 551, 1101; Andrews, 289; 1 Term R. 125, 322; 8 Term R. 543; 1 Phillpotts Ev. ch. 7, § 4.

The cases in which the distinction above mentioned has oftenest been spoken of, are convictions on the English game laws. A very brief notice of these laws, and the decisions under them, may therefore be here given. The statute 22 & 23 Car. II. ch. 25, declares "that all and every person and persons, not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly income of £100 per annum, or for term of life; or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of £130, other than the son and heir apparent of an esquire, or other person of higher degree, &c. &c." are to be persons, by the laws of the realm, "not allowed to have or keep for themselves, or any other person or persons, any guns, bows, greyhounds, &c. gins, snares, &c. but shall be, and are hereby prohibited to have, keep, or use the same." By statute 5 Anne, ch. 14, it is enacted, "that if any person or persons, not qualified by the laws of this realm so to do, shall keep or use any greyhounds, &c. or any engine to kill or destroy the game, and shall be thereof convicted, &c. by the justice or justices of peace, where such offence is committed, &c. the person or persons so convicted shall forfeit the sum of £5," &c. By statute 8 Geo. I. it is made lawful, upon any offence to be committed against any law then in being, for the better preservation of the game, for any person to proceed to recover the penalty by action of debt, or on the case, &c. as well as by information and conviction before a justice of the peace.

It is perfectly settled, that in an information on statute 5 Anne, under which a summary conviction is sought before a justice or justices, it is necessary to negative all the qualifications enumerated in statute 22 & 23 Car. II.; that it is not sufficient to use the words of the former statute, and merely allege that the defendant was not qualified by the laws of the realm, &c. *Rex v. Jarvis*, 1 Burrow, 148. *Rex v. Earnshaw*, 15 East, 456.

The ground on which the courts have uniformly held that in convictions on the game laws, the qualifications in statute of Car. II. must be negated, seems to be, that this statute is quasi incorporated with the statute of Anne. See opinions of Lord Mansfield, and Denison J. 1 East, 647 note; and of Lord Kenyon, 1 East, 650. So far, then, there is no distinction of principle between convictions and indictments and declarations.

But in the application of this principle of quasi incorporation, the courts have hitherto stopped short. In *Bluet v. Needs*, 2 Comyns, 522, it was decided that in an action of debt it was sufficient to negative, in the declaration, that the defendant was qualified by the laws of the realm, without also negating the qualifications in the statute of Car. II. It is to be remarked, however, that Foster J. in *Rex v. Jarvis*, said he was "strongly inclined against the authority of the case in Comyns." 1 East, 647 note.

If this distinction between an information and an action on the game laws may be regarded as established, there is an anomaly in the law. For in all other cases, it is believed, there is no distinction, as to pleading, between summary convictions, and actions and indictments. The only exception that has been

found, has been already stated, and this, as has been seen, has been questioned by high authority.

As this last topic is of little or no direct practical importance in this country, where a trial by jury is secured, ultimately, to every person charged with an offence, it has been examined in no further detail than seemed necessary for the purpose of guarding against the deduction of unwarranted inferences from books which are placed in every student's hands.

For other cases illustrative of this branch of the law of criminal pleading, see *Commonwealth v. Wilson*, 11 Cushing, 413; *Commonwealth v. Sheffield*, 11 Cushing, 178; *Commonwealth v. Edwards*, 12 Cushing, 502; *Commonwealth v. Burding*, 12 Cushing, 506; *Commonwealth v. Hoyer*, 11 Gray, 462; *Commonwealth v. Fitchburg Railway Company*, 10 Allen, 189; *Commonwealth v. Trickey*, 13 Allen, 559; *The State v. Keen*, 34 Maine, 500; *The State v. Gurney*, 37 Maine, 149; *The State v. Abbott*, 11 Foster, 434; *The State v. McGlynn*, 34 New Hampshire, 422; *The State v. Wade*, 34 New Hampshire, 495; *The State v. Shaw*, 35 New Hampshire, 217; *The State v. Abbey*, 29 Vermont, 60; *The State v. Miller*, 24 Connecticut, 522; *The State v. Powers*, 25 Connecticut, 48; *Fleming v. The People*, 13 E. P. Smith, 329; *Rawlings v. The State*, 2 Maryland, 201; *Regina v. Nugent*, 5 Irish Rep. 474; *Rex v. Lawless*, 1 Hudson & Brooke, 535.

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### THE KING *v.* ELLIS.<sup>1</sup>

Easter Term 1836.

#### *Several Felonies Parts of One Transaction — One Evidence to Show the Character of Another.*

If several acts of felonious taking property, are so connected as to form one transaction, evidence of each taking may be received against the prisoner, so as to establish the specific felony charged in the indictment.

Affidavits are not admissible to aggravate punishment upon a conviction for felony, even though the record be removed into this court.

INDICTMENT against the prisoner for feloniously stealing six pieces of the current coin of this realm, called shillings, the property of Susan Newman. Second count, laid the property in S. Newman, and her nine children, naming them. Third count, charged the prisoner with feloniously stealing six pieces of the current coin of the realm, called sixpences, the property of Susan Newman; and the fourth count laid the property in the sixpences to be in S. Newman, and her nine children, naming them. This indictment was

<sup>1</sup> 9 Dowling & Ryland, 174, and 6 Barnewall & Cresswell, 147, but not so fully reported.

found at the jail delivery, in and for the city of Exeter, and upon a suggestion made by the prisoner, supported by affidavits, that he could not have a fair and impartial trial at Exeter, by reason of prejudicial statements published respecting his case in the Exeter newspapers, it was afterwards removed into this court by certiorari; whereupon an order was made that a jury to try the indictment should be impanelled from the body of the county of Devon. At the last summer assizes for the said county, the prisoner was accordingly tried before Littledale J. on the *nisi prius* side, and found guilty. In support of the indictment, the facts proved were these: The prisoner had been shopman in the employment of the prosecutrix, a general dealer, at Exeter. Suspicion being entertained of his honesty, on the 5th September 1825, one of the sons of the prosecutrix, put seven shillings, and one half crown, and one sixpence, all marked in a particular manner into the shop till, in which there was no other silver at that time. The prisoner was then watched by the prosecutrix's son, who went in and out of the shop at different times, looking occasionally into the till, whilst customers came into the shop and purchased goods. When the till was first examined by the prosecutrix's son, it contained eleven and sixpence. After that he received one shilling from a customer and placed it in the till. Another customer soon afterwards paid one shilling to the prisoner, who was seen to go with it to the till, to put his hand into the till, and withdraw it clenched. He then left the counter, and was observed to raise his hand, clenched, to one of his waistcoat pockets. The till was examined again by the prosecutrix's son, and he found only 11s. 6d. instead of 13s. 6d., which ought to have been there. The counsel for the prosecution was then proceeding to examine the witness to other acts of taking money from the till, when Wilde, Serjeant, for the prisoner, contended the prosecutrix must make her election, and confine herself to evidence of one felony, and ought not to be permitted to prove cumulative felonies. The learned Judge, after consulting with Gaselee J. the other Judge of assize, overruled the objection, and allowed the prosecutrix's son to prove several takings by the prisoner. He proved that upon each of several inspections of the till after the prisoner had opened it, he found a less sum than he expected to find. On one occasion there was 8s. 6d. in the till, and he observed that most of that money was marked. He then put in 1s. 6d. more, and upon examining the till again he found



only 6s. 6d. A constable was then sent for, and on searching the prisoner's person, there were 14s. 6d. found in his waistcoat pocket. Six of the shillings were part of the money marked by the prosecutrix's son, and placed by him in the till that morning.

*C. F. Williams* for the prosecution said, he relied upon the taking of the 3s. 6d. after the witness had added 1s. 6d. to the 8s. 6d., which was then in the till, and desired that the learned Judge would exclude from the consideration of the jury the other takings; which was done accordingly. The jury found the prisoner guilty.

*Praed*, on the fourth day of this term (the prisoner being present and placed at the bar), moved for a rule nisi for a new trial, on the ground that the learned Judge had improperly received evidence of more than one felony, the effect of which was to prejudice the prisoner; for, although at the conclusion of the case the counsel for the crown desired the attention of the jury to be confined to one act of taking, yet, as other acts of taking had been previously proved, the minds of the jury must, necessarily, have been biassed against the prisoner by such evidence, when they came to consider of their verdict.

ABBOTT C. J. There may be several counts in an indictment, each professing to charge the prisoner with a distinct and separate felony; and in such case it is usual for the Judge to confine the prosecutor to evidence of one single act of felony, in order that the prisoner may not be entangled in his defence; but where the act charged is of itself multifarious, and it becomes necessary to go through the whole of the evidence, in order to arrive at the truth, I think the judge at the trial has a right to receive such evidence as he in his discretion may think proper for the ends of justice. The course of proceeding at a trial of this nature is entirely a matter of discretion in the judge; and it can be no ground for granting a new trial, that he has exercised that discretion in a way which may be thought prejudicial to the prisoner. If we should lay down the rule so strictly as is contended for, it might lead to very serious consequences, for it might tend to the exclusion of evidence, in many cases essential to the ends of justice. It very often becomes necessary to go through a mass of evidence, in order to enable the judge to fix upon that which establishes distinct proof of a specific crime. However, although we are of opinion that no rule ought now to be taken, yet if

when the prisoner is brought up for judgment, and the learned Judge's report is read, it should occur to us that any injustice has been done towards the prisoner, he shall have the benefit of our opinion.

The prisoner was then remanded, and on a subsequent day he was brought up for judgment, when the Judge's report having been read,

*Chitty* and *Praed*, renewed the application, and contended : first, that inasmuch as each act of taking money from the till was a distinct felony, the evidence of any more than one act was inadmissible on the trial of the prisoner, because of its tendency to distract his attention, and confound him in his defence, and also of the effect it was likely to have on the mind of the jury to his prejudice ; and secondly, that if all the marked money was taken at one time, then the offence amounted only to embezzlement, which was different from that with which he was charged ; and therefore, in either view of the case, the prosecutrix ought to have been put to her election, and not allowed to go into evidence of any more than one taking. They cited 1 East P. C. 354, 519 ; *Rex v. Wylie*, 1 New Reports, 92 ; 2 Leach C. C. 983, and post p. 26 ; *Rex v. Milard*, Russell & Ryan C. C. 245 ; *Rex v. Taylor*, Russel & Ryan C. C. 63 ; 3 Bosanquet & Puller, 596, and 2 Leach C. C. 974 ; *Rex v. Ball*, Russell & Ryan C. C. 132 ; 1 Campbell, 324.

*C. F. Williams*, and *Coleridge*, for the Crown, were stopped by the court.

BAYLEY J.<sup>1</sup> I am of opinion that it was in the discretion of the judge to confine the prosecutrix to the proof of one felony, or to allow her to give evidence of other acts which were all tending to one entire transaction, and to show that in fact but one felony was committed. Generally speaking, where an indictment contains charges of different unconnected felonies, the rule is to confine the prosecutor to one specific charge, in order that the prisoner may not be embarrassed in his defence ; but where there are several felonies connected together, forming parts of one entire transaction, then one may be evidence to show the character of the other. It seems to me, that all the evidence admitted in this case, had a tendency to show that the prisoner was guilty of the felony in question. The evidence objected to, was in fact, nothing more than the history of the state of the till from the time when the

<sup>1</sup> Abbott C. J. was absent.

marked money was put into it, until the period when it was found in the possession of the prisoner. Early in the morning the prosecutrix's son puts into the till seven shillings, a half-crown, and a sixpence, marked in a particular manner. He afterwards sees the prisoner go to the till, and then ascertains what is the state of the till. Unless he had done so, he could not tell whether the prisoner had abstracted any of the marked money at that time. The subsequent examinations of the till, only went to show a history of the state of it; and if that particular question had been pointed out to the attention of the court, probably the prisoner's counsel would have acceded to it. Inasmuch, therefore, as the whole of the evidence only went to give an account of the state of the drawer, until the ultimate period of the prisoner's detection (and with that view it was absolutely necessary), I think there was nothing unfair towards the prisoner, in allowing the evidence to be received, and consequently that there is no ground for the present application.

HOLROYD J. I am of the same opinion. In the case of *Rex v. Egerton, Russell & Ryan* C. C. 375, where the prisoner was indicted for robbing the prosecutor of a coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, I received evidence of a second ineffectual attempt to obtain a 1*l.* note from the prosecutor by similar threats, but reserved the point for the consideration of the Judges, and they were of opinion that the evidence was admissible to show that the prisoner was guilty of the prior offence.

LITTLEDALE J. concurred.

*Rule refused.*

The counsel for the prosecution tendered affidavits in aggravation of punishment; but the court was clearly of opinion that in cases of felony such a mode of proceeding was not allowable. In cases of misdemeanor the rule was otherwise.

The court sentenced the prisoner to be transported for seven years.

The principle, that, when felonies are so connected together as to form part of one entire transaction, evidence of one may be given to show the character of the other, is well illustrated by several recent cases. *Regina v. Rearden*, 4 Foster & Finlason, 76, Willes J. *Commonwealth v. Riggs*, 14 Gray, 376. Thus, where the lessee of a coal-mine had run levels from his own shaft into his neighbors' mines, and had, during a period of four years, been constantly extracting coal belonging to thirty different proprietors, he was permitted to be indicted

in one and the same count for stealing the coal of each of these proprietors; and although Erle J. in summing up, advised the jury to confine their attention to one particular charge, he refused to make the prosecutor elect on which case he would rely, but allowed him to give evidence in support of all the charges, as at least furnishing evidence of a felonious intent. *Regina v. Bleasdale*, 2 Carlington & Kirwan, 765. This shows that as the takings were all by means of one shaft, though from the lands of different people, it was one continuous taking, and that a continuous taking may consist of a number of separate takings.

In *Regina v. Firth*, 38 Law Journal, M. C. 54; Law Rep. 1 C. C. 172, the indictment charged the prisoner with stealing 1000 cubic feet of gas on a particular day. The evidence connected the prisoner with the abstraction for several years of gas from the main of the prosecutors by a pipe which had been used for the purpose of partly lighting a factory by gas without its passing through the meter. It was held that the circumstances attending the abstraction of gas by that means for the whole of that time were rightly given in evidence, and that the prosecutors were not called upon to elect to proceed on one particular act of taking, for the whole of the acts constituted one continuous taking, and did not show separate takings at different times. And it seems that if the facts had amounted to proof of separate and distinct takings from time to time, though the prosecution might have been called upon to elect upon which taking or takings they would proceed, the evidence would have been equally admissible as tending to show the felonious nature of the one taking selected. This case was illustrated by cases put during the argument. Channell B.: "If a man went to one of the cellars at Heidelberg, and from a large vat of hock, which is continually filling, he drew out the wine by means of a plug and set it running, and went away for some time, and the wine continued running for some days from day to day, is not that one continuous act of taking?" Byles J.: "Take the case of pairs of boots disappearing from time to time, and evidence given of stock-taking on the 1st of April of one year, and on the next stock-taking, on the 1st of April of the subsequent year, it was found that 100 pairs of boots had disappeared, and these were all found on the prisoner's premises: could it be said that these were distinct takings, and that the prosecution must elect on which to proceed?" Bovill C. J.: "There may have been fifty takings, but you cannot fix any of them." Lush J.: "Take the case of a man going with a cart and horse to a granary, and taking a load of grain out, and then returning and taking another load of grain, and so on till he had cleared the granary, can you say that that is not one transaction and one taking? *The means continue, and the intention is continually present.*" Bovill C. J. delivered the opinion: "*Regina v. Bleasdale* shows that a continuous taking may consist of a number of separate acts. The judgment of Erle J. in that case, brings it near this case. It is even stronger, for there evidence was given of abstractions of coal belonging to a number of different owners; here the gas taken belonged to one proprietor; viz. the gas company. In *Regina v. Shepherd*, 37 Law Journal, M. C. 45; Law Rep. 1 C. C. 118, the prisoner was convicted of cutting, with intent to steal, trees at one time to the value of 5*l*. The cutting down the trees took place during a certain month, but there was no evidence to show the precise day or days on which they, or any of them, were cut down; and the case turned upon whether trees of a sufficient value had

been cut down at one time. It was said, if the trees were cut down so continuously as to form one transaction, it was a cutting down at one time, and a conviction for cutting with intent to steal at one time, was affirmed. Here the taking was by means of a pipe inserted in the main, and it was always open at the point of junction. There was no period of time at which it was closed; but even if that fact had not existed in this case, I should still have thought it a continuous taking. This case has been illustrated by other instances, put in the argument, of the man going to the granary with wagons and filling them with portions of the grain from time to time, as the opportunities occurred; and of a larceny accomplished by stealing from separate rooms on two successive nights, or from rooms where workmen were employed at successive intervals, as the absence of the workmen afforded opportunity. In all these cases, upon principle, there would be one continuous taking."

Where four indictments were found against a woman, which respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, evidence was tendered on the trial of the first indictment, that arsenic had been taken by the three sons a few months after their father's death; that all the four parties, when taken ill, exhibited the same symptoms; and that the woman, who had lived in the same house with her husband and children, had been in the habit of preparing their meals. It was objected, on behalf of the prisoner, that the facts proposed to be proved took place subsequently to the death of the husband,<sup>1</sup> and were, moreover, calculated to create a suspicion that the prisoner had committed three other felonies; but the court held that the evidence was clearly admissible, for the purpose of proving, first, that the husband died of arsenic, and next, that his death had not been accidental. Pollock C. B.: "I am of opinion, that evidence is receivable that the death of the three sons proceeded from the same cause; namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case, I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family, during the period that the four deaths occurred, is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony." *Regina v. Geering*, 18 Law Journal, M. C. 215. Pollock C. B. who consulted Alderson B. and Talfourd J., and they agreed with him in opinion, and therefore the point was not reserved. The prisoner was executed. See also *Regina v. Garner*, 3 Foster & Finlason, Willes J. and Pollock C. B.; s. c. more fully reported 4 Foster & Finlason, 346. But see *Regina v. Winslow*, 8 Cox C. C. 397, Martin B. and Wilde B., which case is questioned by Mr. Graves. 3 Russell on Crimes, 292 note. 4th ed.

In *Regina v. Proud*, Leigh & Cave C. C. 97, the prisoner, a member of a Friendly Society, was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in

<sup>1</sup> It was conceded that the evidence would have been admissible had the deaths taken place *previously* to the death of the husband.

the contribution and cash books a large number of the sums so received. On being called upon for an explanation, he admitted that he had received the sums so omitted. Upon the trial, these books were tendered generally in evidence, and received; although it was objected that the evidence ought to be confined to the three entries forming the subject of the three charges in the indictment. Held, that they were rightly admitted. And where an indictment for embezzlement charged three offences, and it appeared that the prisoner had made correct entries of a number of payments made by him in one week, but had cast up the whole £2 less than the correct amount; and in another week there was a precisely similar error of the same amount, and the same in a third week, and these were the cases charged in the indictment; Williams J. held that a series of similar errors both before and after those which formed the subject of the indictment were admissible. It was clear that the defence to the three charges would be that these were mere errors in casting up the accounts, and such defence naturally arising, any lawful means might be resorted to whereby such defence might be anticipated, and proved to be ill-founded; and evidence which was admissible for such a purpose was not the less so because it tends to prove the commission of other felonies by the prisoner. *Regina v. Richardson*, 2 Foster & Finlason, 343; 8 Cox C. C. 448. And where a man committed three burglaries in one night, and left at one of the houses property taken from another, the three felonies were considered so connected that the court heard the history of them all. Case cited by Lord Ellenborough in *Rex v. Wylie*, 1 New Reports, at p. 94; 2 Leach C. C. at p. 985, and post p. 28. *Regina v. Stonyer*, Wightman J. 3 Russell on Crimes, 282. 4th ed. And the same course was adopted where the prisoner was charged on three indictments with firing three stacks belonging to separate parties, and it appeared that the stacks, being within sight of each other, were fired about the same time. *Rex v. Long*, 6 Carrington & Payne, 179, Gurney B. *Regina v. Cobden*, 3 Foster & Finlason, 833, Bramwell B.

It is to be observed, that in all these cases the evidence must be taken to be subject to the qualification that the other felonies were shown to have some connection with the felony charged. Where an indictment contained counts for stealing and receiving woollen cloth, the property of A., knowing it to have been stolen, evidence of the possession of cloth stolen from another person, prior to the time of the stealing charged in the indictment, was held not admissible to prove either the larceny or the receiving. Lord Campbell C. J.: "The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first." *Regina v. Oddy*, 20 Law Journal, M. C. 198; 5 Cox C. C. 210; 2 Denison C. C. 264. See *Parker v. Green*, 2 Best & Smith, 299, 310, See also the note to *The King v. Wylie*, post pp. 32, 33.

THE KING *v.* WYLIE.<sup>1</sup>

April Term 1804.

*Counterfeit Bank Notes and Coin — Previous and Subsequent Utterings — Different Denomination — Evidence of Guilty Knowledge.*

To prove the guilty knowledge of an utterer of a forged bank-note, evidence may be given of his having previously uttered other forged notes, knowing them to be forged.

At the Old Bailey, in April session 1804, Sarah Wylie, otherwise Evans, and Ann Haines, otherwise Foss, were tried before Mr. Justice Heath, present Baron Thompson, on an indictment containing eight counts, charging them, first, with forging a two-pound bank-note on the 12th March 1804; secondly, with feloniously offering, disposing of, and putting away a forged note; thirdly, with forging a promissory note for the payment of money, in the form of a bank-note; fourthly, with uttering it knowingly; and four other counts, with intention to defraud, first, the Bank of England, and, secondly, John Hind.

The two prisoners, on the 12th March 1804, went together into the shop of Mr. Hind, an ironmonger, No. 134 Whitechapel, and purchased a brass footman for four shillings, for which Wylie offered the note in question to pay for it; but on its being communicated to them that it was suspected to be a bad one, they both affected great surprise, and produced a good note, and paid for the article out of it. Being, however, questioned as to where they lived, and from whom they had received the first note, they prevaricated, and gave in not only false names, but false addresses to their residence. The note and the prisoners were therefore stopped by Mr. Hind's journeyman, who told them they must go with him to the bank, which they refused to do, and they were taken into custody on suspicion that they had offered it knowing it to be forged; but, to make this fact more clear, the counsel for the crown offered evidence that the prisoners had, on the 13th February 1804, uttered a forged two-pound note to Mr. Jones, cheese-monger, No. 7 Cow Lane; another on the 25th February, to Mr. Findle, of Brewer Street, Golden Square; another on 28th

<sup>1</sup> 1 New Reports, 92; s. c. under the name of *The King v. Whiley*, 2 Leach C. C. 983. 4th ed.

February, to Mr. Corder, grocer, Broad Street, Bloomsbury; and that on being asked, at each place, for their names and places of abode, they gave false names and false addresses.

*Knapp* and *Alley*, for the prisoners, objected to this evidence. They contended that the facts now offered in evidence would, if true, constitute three distinct and independent charges of felony; and that it was a settled rule of law, that no testimony could be given of any fact not relevant to or connected with the specific charge in the indictment, which was the only charge of which the prisoners had notice, or against which they were in any way prepared to defend themselves. That in indictments of burglary or robbery, the court never suffered other burglaries or other robberies, previously committed by the same person, to be given in evidence for the purpose of showing that the act charged to have been done, was done by the prisoner intentionally and with a guilty mind. Even upon an indictment analogous to the present, for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment; and that the offences of knowingly uttering counterfeit coin and forged bank-notes were so similar to each other, that no reason could be assigned why any distinction should be made between them as to the rules of law, or why an established principle should prevail in the one case and not in the other; a departure from which would manifestly tend, by introducing transactions foreign to the charge, to confound and perplex prisoners in their defence; and that for this reason it had always been usual to quash an indictment for a misdemeanor, if there were several misdemeanors included in it.

*Garrow*, *Fielding*, *Giles*, and *Bosanquet*, for the Crown, were stopped by the court.

LORD ELLENBOROUGH C. J. Certainly the same rules of law must prevail, whether the prosecution be at the instance of the Bank of England, or be instituted by private persons; but the point now made has been already discussed and settled by the twelve Judges in *Tattershall's Case*, before Mr. Justice Chambre, at Lancaster, in the year 1801, and reserved by him for the opinion of the Judges. It was an indictment for forging and knowingly uttering a bank-note, and the question was, whether the prosecutor, in order to show that the utterer knew it to be forged, might give the conduct of the prisoner in evidence for the purpose of proving his knowledge of the forgery; that is, whether from the conduct of the prisoner on one occasion, the jury might not infer his knowledge



on another; and the Judges were of opinion that the court was authorized by law to receive such evidence. The observations respecting prisoners being taken by surprise, and coming unprepared to answer or defend themselves against extrinsic facts, is not correct. The indictment alleges that the prisoner uttered this note knowing it to be forged, and they must know that, without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged, or whether it was uttered under circumstances which showed their minds to be free from that guilt. I remember the case of a person who came to Manchester with a large parcel of forged notes; and the circumstances of his whole conduct afforded strong evidence of the intent and purpose with which he went there; and a question was made, whether these circumstances might be given in evidence; for it was said that this would be trying the prisoner for other utterings than those charged in the indictment; but if several and distinct offences do so intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued. There is a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another; and they were all so connected that the court heard the history of the three different burglaries.<sup>1</sup> True it is, that the more detached the previous utterings are, in point of time, the less relation they will bear to the particular uttering stated in the indictment; and when they are so distant, the only question that can be made is, whether they are sufficient to warrant the jury in making any inference from them as to the guilty knowledge of the prisoner; but it would not render the evidence inadmissible. Circumstances of this kind may produce such strong evidence as to leave no doubt as to the prisoner's

<sup>1</sup> So where three burglaries were committed in the town of Uttoxeter, one at Keeling's, and another at Bladon's, between twelve and three o'clock of the same night, and at Bladon's a crowbar was found, which fitted some marks on a chest broken open at Keeling's, and which was proved to have been in the possession of the prisoners previously to the night in question; Wightman J. on the authority of this case, allowed evidence to be given of the finding of the crowbar at Bladon's, and also of the finding goods stolen the same night from Bladon's, in the possession of the prisoners, as such evidence tended to show that the prisoners had been at Bladon's, and that they might have left the crowbar there. *Regina v. Stonyer*, 3 Russell on Crimes, 282. 4th ed. See also *Regina v. Cobden*, 3 Foster & Finlason, 833.

knowledge that these notes were forged. I am therefore of opinion, under the authority of the cases I have stated, that it is competent for the court to receive evidence of other transactions, though they amount to distinct offences, and of the demeanor of the prisoner on other occasions, from which it may be fairly inferred that he was conscious of his guilt while he was doing the act charged upon him in the indictment; and if this species of evidence do not warrant such an inference, it will be laid out of the case.

HEATH J. The case of *Rex v. Tattershall* has already decided this question. No person can be punished for an offence until he has been regularly charged with and convicted of it. The charge in this case puts in proof the knowledge of the prisoner; and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances. I remember a case where several persons were indicted for a conspiracy to raise wages, and on the trial evidence was received of circumstances, which, taken by themselves, amounted to substantive felonies; but as these circumstances were material to the point in issue, they were admitted in evidence.

THOMPSON B. I am of the same opinion. The case of *Rex v. Tattershall* is exactly in point. As to the case put by the prisoner's counsel, of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day to prove the guilty knowledge. Such other uttering cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money he uttered was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a common utterer; but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad.

The court, therefore, received the evidence objected to, and the prisoners were both found guilty.

The general rule of law undoubtedly is, that upon the trial of a single issue in a criminal cause, no other distinct acts of the defendant can be given in evidence, especially if these acts amount to another offence. *Commonwealth v. Eastman*, 1 Cushing, 216. *Commonwealth v. Miller*, 3 Cushing, 244, 251. *Common-*

wealth *v.* Tuckerman, 10 Gray, 173, 200. *Commonwealth v. Shepard*, 1 Allen, 575, 581. "It is a dangerous species of evidence," said Bigelow C. J. "not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle, that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent." This rule has some limitations and exceptions, and we propose to examine how far other criminal acts can be given in evidence upon the trial of a particular criminal issue. The principle of the case in the text has been followed with some limitations, so far as the reasoning of that decision is concerned. In *Rex v. Hough*, Russell & Ryan C. C. 120, it was adjudged that other forged bills on the same house found on the prisoner at the time of his apprehension were properly admitted as evidence of his (guilty) knowledge in a trial for forgery of a bill of exchange. No notice is taken of *Wylie's Case*, decided three years before, and *Rooke J.* doubted, *Mansfield C. J.* and *Heath J.* being absent. *Rex v. Ball*, Russell & Ryan C. C. 132, and 1 Campbell, 324, by a majority opinion, decides that similar forged bills of the Bank of England, which, prior to the act on trial, had been in the prisoner's possession, and another uttering of like notes, were admissible for this purpose; *Chambre J.* dissented, because it was evidence of facts wholly distinct from the subject of inquiry, which the prisoner could not be prepared to answer or explain. In *Sunderland's Case*, 1 Lewin C. C. 102, this principle was extended to giving in evidence other forged notes of private bankers, on the trial of an indictment for forging Bank of Ireland notes. In this case the point was not taken. The same was held in *Hodgson's Case*, 1 Lewin C. C. 102, although the notes offered were the subject of another indictment against the prisoner; *Hullock J.* hesitated. This was also adjudged in *Kirkwood's Case*, 1 Lewin C. C. 103; 1 Moody C. C. 304.

It must now be taken to be fully settled that if the evidence is otherwise competent it will not be rejected; because the prisoner is under indictment for the acts offered in proof. *Kirkwood's Case*, 1 Lewin C. C. 103, *Littledale J.* *Regina v. Aston*, 2 Russell on Crimes, 841. 4th ed. *Commonwealth v. Stearns*, 10 Metcalf, 256. 1 Taylor Ev. § 322. 5th ed. 3 Russell on Crimes, 286. 4th ed. *Regina v. Lewis*, Archbold Crim. Pl. (14th ed.) 486, per Lord Denman C. J. who observed that "he could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge." As proof of guilty knowledge, *Rex v. Balls*, 1 Moody C. C. 470, has extended the evidence to the possession of plates or forged instruments of any kind, at any time previous to the act prosecuted. There, on a trial for uttering a forged cash note of the kingdom of Poland, on the 1st September 1835, evidence was given that the prisoner had agreed to make a thousand Austrian notes, of fifty florins each, for three shillings each note. And also, that in September 1834, the prisoner caused a plate to be engraved, and five hundred impressions of Polish notes, other and different from the one uttered. And, upon this point reserved, the Judges held the evidence admissible.

On an indictment for knowingly uttering a forged document, or a coun-

terfeit bank-note, or counterfeit coin, evidence of the possession, or of the prior or *subsequent* (*Regina v. Foster*, Dearsly C. C. 456<sup>1</sup>) utterance, either to the prosecutor himself or to other persons, of other false documents or notes, or bad money, though of a different description,<sup>2</sup> *Rex v. Harris*, 7 Carrington & Payne, 429, by all the Judges; *Regina v. Foster*, Dearsly C. C. 456, and though themselves the subjects of separate indictments, is admissible as material to the question of *guilty knowledge or intent*. *Regina v. Nisbett*, 6 Cox C. C. 320, Williams J. *Regina v. Salt*, 3 Foster & Finlason, 834, Williams, J. In *Commonwealth v. Hall*, 4 Allen, 305, evidence was held to be admissible for the purpose of proving guilty knowledge that the defendant swallowed a counterfeit bank-bill, which he had in his possession at the time of his arrest the morning after the commission of the utterings alleged in the indictment; the bill being similar to those passed by him the evening before. Evidence was also admitted that the defendant had been employed in the business of printing parts of genuine bank-bills, as tending to show that the bills which he passed were counterfeit. And in a very recent case the law was broadly laid down, that "other substantive felonies which have a tendency to establish the scienter may undoubtedly be proved for that purpose." *Regina v. Weeks*, Leigh & Cave C. C. 18, 21 (1861). And see *Bottomley v. The United States*, 1 Story, 143; *Rex v. Fuller & Robinson*, Russell & Ryan C. C. 308; *Regina v. Jarvis*, Dearsly C. C. 552.

The American courts, both in practice and by authority, have adopted this exception in the law of evidence. *The State v. Antonio*, 2 Constitutional R. 776. *The United States v. Roudenbush*, Baldwin, 514. *The State v. McAlister*, 24 Maine, 139. *Hendrick's Case*, 5 Leigh, 707. *Commonwealth v. Stearns*, 10 Metcalf, 256. *Commonwealth v. Bigelow*, 8 Metcalf, 235. *Commonwealth v. Stone*, 4 Metcalf, 43, 47, extends this kind of evidence to proof of the scienter upon an indictment for falsely representing the bill of an insolvent bank as good, and thereby obtaining property with intent to defraud. The court there say, the case is strictly analogous on the rule in relation to proof of scienter on a charge of passing counterfeit bills, or coins, which is well established here and in England.

In these cases, it is essential to produce, at the trial, the instruments offered in evidence of guilty knowledge, or to show a sufficient reason for their non-production, and to prove distinctly that they were forged or counterfeit. *Rex v. Millard*, Russell & Ryan C. C. 245; *Commonwealth v. Bigelow*, 8 Metcalf, 235. And though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time, with respect to such uttering; for these are collateral facts, too remote for any reasonable presumption of guilt

<sup>1</sup> The difference in the denomination of the coin goes to the weight of the evidence, but does not affect its admissibility. This case disposes of a doubt raised in *Rex v. Taverner*, Carrington's Supplement, 195; 4 Carrington & Payne, 413 note; and in *Rex v. Smith*, 4 Carrington & Payne, 411, as to whether evidence of *subsequent* utterings would be admissible, if the notes or coin were of a different description.

<sup>2</sup> In *Commonwealth v. Price*, 10 Gray, 472, which was an indictment for having a counterfeit bank-bill with intent to pass it, evidence was admitted that the defendant, eight days afterwards, had in his possession, in another State, other counterfeit bills in no respect similar to those set out in the indictment.

to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict. *Rex v. Phillips*, 1 Lewin C. C. 105, Bayley J. *Regina v. Cooke*, 8 Carrington & Payne, 586, Patteson J. *Contra*, *Rex v. Forbes*, 7 Carrington & Payne, 224, Coleridge J. See *Regina v. Brown*, 2 Foster & Finlason, 559. On an indictment for having counterfeit bank-bills, with intent to pass them, evidence is clearly competent of previous declarations of the defendant, showing that he was then engaged in the business of passing counterfeit money; but the contents of a letter, containing counterfeit money, received by him at the post-office, and immediately taken from his possession before he had opened it, cannot be proved. *Commonwealth v. Edgerly*, 10 Allen, 184.

The laxity of evidence, which prevails in charges of uttering, and of one or two offences of a cognate character, e. g., obtaining money by falsely pretending to a pawnbroker that a spurious chain was silver, *Regina v. Roebuck*, Dearsly & Bell C. C. 24, 26,<sup>1</sup> is not allowed to the same extent in other criminal charges,<sup>2</sup> even though the collateral facts may have some tendency to establish the guilty knowledge or intent, which constitutes a necessary ingredient of the crime. For instance, on an indictment against a thief or a receiver, the fact that the prisoner has at various times received and pledged other property, stolen from different persons, cannot be given in evidence, *Regina v. Oddy*, 2 Denison C. C. 264; though if it can be shown that the chattels so received and pledged have been stolen from the *prosecutor*, the evidence will be admissible, as raising some presumption of guilty knowledge, with respect to the articles mentioned in the indictment. *Regina v. Dunn*, 1 Moody C. C. 146. *Regina v. Nicholls*, 1 Foster & Finlason, 51.

Another apparent exception to the rule, that one felony cannot be inquired of upon the trial of another, is in proof of criminal intent. This stands on nearly the same ground as proof of guilty knowledge. It will be found, however, that in all the cases, the acts offered in evidence to prove the intent were parts of the subject-matter with the fact on trial, and thus forming links more or less closely connected of a chain of circumstances. Thus, in *Commonwealth v. Tuckerman*, 10 Gray, 173, on an indictment for embezzlement, other previous acts of a similar character, enumerated with the one charged in the indictment in a paper drawn up by the defendant as a statement of all sums taken by him, were held to be admissible in evidence to show the intent with which the act charged was committed. *Regina v. Dossett*, 2 Cox C. C. 243; 2 Carrington & Kirwan, 306. *Commonwealth v. Turner*, 3 Metcalf, 19. This is the view taken in *Regina v. Bleasdale*, 2 Carrington & Kirwan, 765, ante pp. 22, 23. In *Regina v. Butler*, 2 Carrington & Kirwan, 221, evidence of what the prisoner said about money of the prosecutor, found in his possession at the time of his arrest, *other* than that for which he was indicted, was held by Platt B. not to be competent, and the case may be thus reconciled. It was an admission by the prisoner of another

<sup>1</sup> It is to be observed that the conviction in this case was affirmed without any reference to the admission of this evidence.

<sup>2</sup> The doctrine does not extend to ordinary indictments for obtaining money by false pretences. *Regina v. Holt*, Bell C. C. 280; 8 Cox C. C. 411. Still it has been applied to cases of arson with intent to defraud insurance companies. *Regina v. Gray*, 4 Foster & Finlason, 1102, Willes J. and Martin B. Sed quære.

separate felony. So in *Robinson's Case*, 2 Leach C. C. (4th ed.) 749; *Rex v. Voke*, Russell & Ryan C. C. 531; *Regina v. Taylor*, 5 Cox C. C. 138; *Rex v. Ellis*, 9 Dowling & Ryland, 174, ante p. 18.

In offences of which the gist is that the defendant has sustained a character as a common utterer of counterfeit coin, common barrator, common seller of spirituous liquors, or where a combination or conspiracy is alleged, great latitude is allowed in giving in evidence various acts of the defendant. *Rex v. Roberts*, 1 Campbell, 400. *Commonwealth v. Turner*, 3 Metcalf, 19. *Commonwealth v. Eastman*, 1 Cushing, 189. It is usual, however, to lay such offences, barratry and the like, with a *continuando*, and if so laid evidence cannot be given without the time, save when it might be upon a trial of a single act. *Commonwealth v. Elwell*, 1 Gray, 463. *Commonwealth v. Briggs*, 11 Metcalf, 573.

A case has been decided in Massachusetts, *Commonwealth v. Merriam*, 14 Pickering, 518, which cannot be brought within the reasoning of any of the exceptions above stated, and which is in direct conflict with the general rule which has been recognized by that court in the cases, *Commonwealth v. Turner*, 3 Metcalf, 19; *Commonwealth v. Wilson*, 2 Cushing, 590. *Commonwealth v. Merriam* seems to have been but little considered by the court, is unsupported by authority, and the reasoning is but little satisfactory.<sup>1</sup> It is in direct contrast with the manly and logical caution of Lord Campbell C. J. in the late case of *Regina v. Oddy*, 20 Law Journal, M. C. 198; 5 Cox C. C. 210, where he says: "I am of opinion that the evidence objected to was as admissible under the first two counts as it was under the third, for it was evidence which went to show that the prisoner was a very bad man, and a likely person to commit such offences as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. The evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen at the time that he received them. The rule which has prevailed in the case of indictments for uttering forged bank-notes, of allowing evidence to be given of the uttering of other forged notes to different persons, has gone to great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of opinion that the evidence admitted in this case with regard to the scianter, was improperly admitted, as it afforded no ground for any legitimate inference in respect of it. The conviction, therefore, must be quashed." See also *The*

<sup>1</sup> In this case a party was tried upon an indictment for the crime of adultery. Evidence of three instances of improper familiarity between the prisoner and his supposed paramour, one of which occurred within a fortnight and the others within a year next preceding the particular act complained of, was held to be admissible; and this manifestly for the purpose of showing the intent of the parties when they met in secret, so that no direct evidence of their conduct there could be expected to be produced. And in delivering the opinion of the court, it was said by Putnam J.: "Evidence should be excluded which tends only to the proof of collateral facts. But it should be admitted if it has a natural tendency to establish the fact in controversy." To which he immediately adds: "It was argued that the defendant was not to be put upon his trial for every act of his life, but for a particular offence. Be it so; if the evidence which was received has a natural tendency to corroborate the direct evidence in the case, it would seem to be clearly admissible." See *Commonwealth v. Tuckerman*, 10 Gray, at p. 200.

State v. Barton, 18 Ohio, 291; The State v. Wallace, 9 New Hampshire, 515, 517. In Regina v. Green, 3 Carrington & Kirwan, 209, it is said by Cresswell J. that this language in Regina v. Oddy, supra, is not to be extended to other cases than utterings. See ante p. 25.

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### THE KING v. HOLLINGBERRY.<sup>1</sup>

Trinity Term 1825.

#### *Proof of so much of an Indictment as Constitutes a Crime Punishable by Law — Divisible Averments.*

Indictment for a conspiracy to extort money. One count averred that defendants, in pursuance of a conspiracy to extort money from the prosecutor, *falsely* exhibited certain indictments against him; another count averred that defendants, in pursuance of the like conspiracy, offered to suppress an indictment pending against the prosecutor if he would give them money for so doing. The jury found the defendants guilty, generally, but found, specially, that the indictments, preferred by them against the prosecutor, were not *false*: — *Held*, that the averment in the former count was immaterial, and that the latter count would support the conviction. *Held also*, that a conspiracy to extort money is per se an offence at common law, and need not be charged to be attempted by unlawful means.

*Held also*, that where, upon the trial of an indictment for a misdemeanor, a witness examined before the grand jury was not examined at the trial, and a witness not examined before the grand jury was examined at the trial, this was not such a surprise upon the defendants as entitled them to a new trial.

THIS was an indictment against the defendants for a conspiracy. The first count stated that defendants, intending unlawfully, fraudulently and deceitfully, to extort, obtain, and procure of and from the prosecutor a large sum of money for their use, on &c. at &c. did corruptly and unlawfully conspire together to extort, obtain, and procure of and from the prosecutor a large sum of money for their use, and in order to extort, obtain, and procure the same, did corruptly and unlawfully conspire to indict the prosecutor for having kept a common gaming house, &c. That defendants, in furtherance of their conspiracy, afterwards to wit on &c. at &c. at the quarter sessions, &c. did *falsely* exhibit, and caused to be exhibited, a certain bill of indictment against the prosecutor, and afterwards, in pursuance, &c. did corruptly, wilfully, and wickedly procure and cause the said bill of indictment to be returned a true

<sup>1</sup> 6 Dowling & Ryland, 345; 4 Barnewall & Cresswell, 329.

bill. That defendants, in further pursuance, &c. afterwards to wit, on &c. at &c. in the Court of King's Bench, did *falsely* exhibit, and cause to be exhibited, a certain bill of indictment against the prosecutor, and did afterwards, in pursuance, &c. corruptly, wilfully and wickedly procure and cause the said bill of indictment to be returned a true bill. That defendants, in pursuance, &c. afterwards to wit on &c. at &c. did unlawfully and wilfully endeavor to obtain and procure of and from the prosecutor a large sum of money as and for a consideration or recompense to them for compromising and suppressing the said indictments, and giving up the further prosecution thereof. Second count, that defendants preferred an indictment at the quarter sessions against the prosecutor for keeping a common gaming-house, which being removed into the Court of King's Bench and depending there, defendants did unlawfully and wickedly conspire to extort, &c. of and from the prosecutor a large sum of money, and in pursuance, &c. did unlawfully propose to the prosecutor to suppress the indictment, and to withhold certain evidence which they had and could bring forward to prove that the prosecutor had unlawfully kept a common gaming-house, if he would give and pay to them a large sum of money for their use. Third count, that defendants, wickedly intending to extort, &c. of and from the prosecutor divers large sums of money, did unlawfully and wickedly conspire to extort, obtain, and procure of and from the prosecutor divers large sums of money, and in pursuance of their conspiracy did propose to compromise and suppress a certain indictment before preferred against the prosecutor by defendant Bowley, and then pending in the Court of King's Bench, and a certain other indictment before preferred against the prosecutor by defendant Smith, then also pending in the Court of King's Bench, and to prevent further proceedings being taken against the prosecutor thereon, if the prosecutor would give and pay to defendants a large sum of money, as a consideration and recompense to them for compromising and suppressing the last mentioned indictments, and preventing any further proceedings being taken against the prosecutor thereon. Plea, not guilty. At the trial before Abbott C. J. at the adjourned Middlesex sittings after last term, the jury found the defendants guilty, and found also, specially, that the indictments, preferred against the prosecutor by the defendants, *were not false*.

*Chitty*, on the part of the defendant Hollingberry, now moved,



in the alternative, either for a new trial, or to arrest the judgment. First, the defendant is entitled to a new trial, on the grounds of breach of good faith and surprise. The prosecutor went before the grand jury when the indictment was presented, and his name appeared indorsed upon it as a witness. This was a pledge by him that he would tender himself as a witness at the trial, and his omitting so to do was not only a breach of good faith on his part, but was an injury to the defendant; to whom it might have been extremely important to cross-examine the prosecutor, and whose undoubted right it was, by law, to have the opportunity of cross-examining every witness whose name appeared on the back of the bill. It has been expressly decided, with reference to a civil action, that when a witness has once been sworn to give evidence, the other party may cross-examine him, though he gave no evidence for the party that called him; *Phillips v. Eamer*, 1 *Espinasse*, 357; and even in a prosecution for a misdemeanor, where a witness was called, and produced a document, but was not examined, the defendant was allowed to cross-examine him. *Rex v. Brooke*, 2 *Starke N. P. C.* 472. Surely, then, when a witness has been examined before a grand jury, where he cannot be cross-examined, but where his evidence has been received and has operated against a defendant, as here, he ought to appear at the trial, and subject himself to the cross-examination of the defendant there. Then, a witness named Westmacott, who was not examined before the grand jury, and whose name was not on the back of the indictment, was examined at the trial. This was a surprise upon the defendant, who had no reason to expect the production of that witness, and who, consequently could not prepare himself to explain or refute the facts to which he deposed. Secondly, the judgment in this case must be arrested on two grounds. First, there is a fatal variance between the indictment and the evidence, for the former charges that the defendants, in furtherance of their conspiracy to extort money from the prosecutor, *falsely* exhibited two indictments against him, whereas the jury have expressly found that the indictments which they presented against him were true. Secondly, the indictment does not charge the defendants with the commission of any offence in law. The act charged is, the conspiring to extort money. Now, money may be, under various circumstances, extorted honestly and by lawful means; as by a creditor from his debtor; and the conspiring to do an act, not in itself illegal, will not support an in-

dictment for a conspiracy. *Rex v. Turner*, 3 East, 228. Besides, the act is not charged to be done by undue and illegal means, which, for the reason already assigned, it must be. *Rex v. Gill*, 2 Barnewall & Alderson, 204.

ABBOTT C. J. I am of opinion that no sufficient ground has been suggested for granting a new trial in this case. If Taylor's evidence was material for any one of the defendants, he might have subpoenaed him: I cannot say that he was bound to appear as a witness at the trial, merely because he went before the grand jury, and suffered his name to be written on the back of the indictment; nor that he was restrained from producing Westmacott at the trial, merely because he did not produce him before the grand jury. Neither do I think that there is any pretence for granting a rule to show cause why the judgment should not be arrested. The indictment, in my opinion, most clearly charges a legal offence, and an attempt to commit it by illegal means. I consider the very term, "extort," necessarily to imply the adoption of illegal means; the third count, therefore, is undoubtedly good, because that states only that the defendants unlawfully conspired to extort money from the prosecutor by offering to suppress an indictment pending against him, if he would give them a sum of money as a consideration for so doing. The first two counts certainly charge that the defendants conspired *falsely* to exhibit indictments against the prosecutor. If that *must* be construed to mean that they conspired to exhibit *false* indictments against him, there is a variance, because the jury have expressly found that the indictments were not false. But, as it seems to me, that allegation may fairly be construed to mean, and I believe that it really did mean, that the defendants falsely exhibited the indictments; that is, exhibited them, not for the purposes of justice, but for false and wicked purposes of their own; which, whether true or not, is an immaterial allegation, because the question was whether they exhibited them illegally, with an illegal intent and for an illegal purpose, which the jury, after full consideration, have found that they did.

BAYLEY J. I am entirely of the same opinion. With respect to the motion for a new trial, I do not think it necessary to say any thing. With respect to the motion in arrest of judgment, it is quite clear, for the reasons already given by my Lord Chief Justice, that the third count is properly framed, and is well sup-

ported by the evidence. And that is enough to support the conviction, for in a case like this, it is by no means necessary either to prove all the counts of the indictment, or to prove all the allegations of any one count. If so much of any one count is proved, as charges an offence at law, that is sufficient, and that has certainly been done here.

HOLROYD J. and LITLEDALE J. concurred; the latter adding, that in Comyns' Digest, tit. Extortion, it would be found that extortion is described as a legal offence, *per se*.

*Rule refused.*

It is a general rule, which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of an offence punishable by law, and for which he may by law be convicted on that indictment. *Commonwealth v. Livermore*, 4 Gray, at p. 19. *Commonwealth v. Armstrong*, 7 Gray, at p. 50. *Commonwealth v. Kimball*, 7 Gray, at p. 331. *Commonwealth v. Burns*, 9 Gray, 287. *Commonwealth v. Leonard*, 11 Gray, 458. In Gabbett's Criminal Law, II, 415, this rule is thus stated: "It is a general rule which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of a substantive crime therein stated, without proving the full extent of the charge." Thus, if A. is charged with the murder of B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprised of the nature of it, the verdict enables the court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. *Mackally's Case*, 9 Rep. 67 b. Co. Litt. 282 a. *Commonwealth v. Roby*, 12 Pickering, at p. 504. In burglary and the various statutory breakings and enterings into dwelling-houses and other buildings, if the proof of the breaking and entering should fail, and the fact of stealing in the dwelling-house, or other building, should be proved, the verdict would so find, and the sentence follow, annexed by statute to that offence. *Commonwealth v. Hope*, 22 Pickering, 1, 7. *Kite v. Commonwealth*, 11 Metcalf, 581, 583. But if the fact of stealing only were found, and it were found to be not in a dwelling-house or other building, the jury may well find that part of the charge, and it would be the proper basis for a judgment as for simple larceny. *Commonwealth v. Hope*, 22 Pickering, 1, 7. *Commonwealth v. Mahar*, 8 Gray, 469. *Commonwealth v. Hathaway*, 14 Gray, 392. On a charge of robbery, if the property be not taken from the person by violence or putting in fear, the prisoner may be convicted of the simple larceny. 2 Hale P. C. 302. And upon an indictment against a person for the compound offence of larceny, as a servant, he may be convicted of simple larceny. *Regina v. Jennings, Dearsly & Bell* C. C. 447. In larceny, if any one of the articles enumerated in the indictment, provided it is sufficiently described, *Commonwealth v. Eastman*, 2 Gray, 76; is proved to have been stolen by the defendant, it is sufficient, 2 Hale P. C. 302; unless the collective value of the whole of them is alleged. *Hope v. Common-*

wealth, 9 Metcalf, 134. See *Commonwealth v. McKenney*, 9 Gray, 114. Where a count alleged that the defendants conspired by divers false pretences and subtle means and devices to extort from T. E. a sovereign of his moneys, and to cheat him of the same, and the evidence failed to prove any false pretences; Crompton J., after consulting Coleridge J., held that an indictable offence was charged without reference to the false pretences, and therefore it was not necessary to prove the false pretences, but it was sufficient to prove enough to sustain the rest of the count. *Regina v. Yeates*, 6 Cox C. C. 441. And so in an indictment for obtaining money by false pretences, though the offence must not only be distinctly set out, but proved without any substantial variance, yet it is not necessary that all the false pretences set forth in the indictment should be proved; it will be sufficient if any entire allegation of pretence and falsehood be sustained,<sup>1</sup> provided it shall appear that the cheat was effected by means of such falsehood. *Rex v. Hill, Russell & Ryan* C. C. 190. *Commonwealth v. Morrill*, 8 Cushing, 571. *The State v. Mills*, 17 Maine, 211. *The State v. Dunlap*, 24 Maine, 77. *The People v. Haynes*, 11 Wendell, 557. When any one distinct assignment of perjury, in an indictment for that offence, is well made, and the defendant is found guilty, he must be sentenced on his conviction, however defective the other assignments may be. This is the settled law. *Regina v. Rhodes*, 2 Lord Raymond, 887. *The State v. Hascall*, 6 New Hampshire, 358. *De Bernie v. The State*, 19 Alabama, 23. *Commonwealth v. Johns*, 6 Gray, 275.

“Where a statute annexes a higher degree of punishment to a common-law felony, if committed under certain circumstances, if, upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed, under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only. So if a misdemeanor at common law be made additionally penal by statute, if committed under certain circumstances, the defendant shall be convicted only of the misdemeanor at common law, if the prosecutor succeed in proving the commission of the offence, but fail in proving that it was committed under the circumstances specified in the statute.” 2 Hale P. C. 191, 192. Archbold Crim. Pl. (14th ed.) 187. Where the defendant was indicted for stealing a colt, it was held that he could not be convicted under the statute 1 Edw. VI. ch. 12, § 10, which did not mention colts, but might be convicted of the simple larceny. *Rex v. Beaney, Russell & Ryan* C. C. 416. Upon an indictment for conspiring to prevent workmen from continuing to work, Pattenon J. ruled that it is sufficient to prove a conspiracy to prevent one workman from working. *Rex v. Bykerdike*, 1 Moody & Robinson, 179. Upon a count for assaulting, beating, wounding, and occasioning actual bodily harm, under the statute, the prisoner may be convicted of a common assault. *Regina v. Oliver*, Bell C. C. 287; 8 Cox C. C. 384. *Regina v. Yeadon, Leigh & Cave* C. C. 81; 9 Cox C. C. 91. And this, although the word “assault” is not used in the indictment. *Regina v. Taylor*, Law Rep. 1 C. C. 194. Upon an indictment for an assault upon an officer while in the discharge of the duties of his office, and obstructing and hindering him therein, the defendant may be convicted of a simple assault. *Commonwealth v. Kirby*, 2 Cushing, 577.

<sup>1</sup> Unless the several false pretences are so connected as to be incapable of separation. *Regina v. Wickham*, 10 Adolphus & Ellis, 34.

The Revised Statutes of Massachusetts, ch. 127, § 15, enacts, that any person having in his possession ten or more pieces of counterfeit coin, with intent to utter or pass the same as true, shall be punished by imprisonment for life, or any term of years; § 16 enacts, that any person having less than ten pieces shall be punished by imprisonment, not more than ten years, &c. Upon an indictment charging the defendant with having more than ten pieces, proof of his having less than ten is sufficient to warrant a conviction, and the convict may be sentenced under § 16. "The substance of the crime," says Shaw C. J., "is the possession of counterfeit coin, with the guilty knowledge and intent indicated, and this is a substantive offence, whether the number of pieces be over or under ten. The party was therefore found guilty of the offence stated, although not to the extent laid in the indictment." *Commonwealth v. Griffin*, 21 Pickering, 523. The same principle was recognized and adopted in *Commonwealth v. Kneeland*, 20 Pickering, 206, which was an indictment for blasphemy.

The distinction above considered applies where an indictment contains *divisible averments*. The rule is that cumulative allegations, or such as merely operate in aggravation, are immaterial; provided that sufficient is proved to establish an offence included in the charge, specified in the record. This rule was adopted and defined by Lord Ellenborough, in the case of *Rex v. Hunt*, 2 Campbell, 583. There the defendant was charged in an information, with *composing*, printing, and publishing a libel, but no evidence was given to show that he was the *author*. His counsel thereupon claimed an acquittal on his behalf, but the learned judge observed: "It is enough to prove publication.<sup>1</sup> If an indictment charged that the defendant did and caused to be done a particular act, it is enough to prove either."<sup>2</sup> The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified."

In like manner, if a *compound intent*, or several intents, be laid in the indictment, and if one part of the compound intent, or each of the several intents when coupled with the act done, constitute an offence, it will not be necessary to prove the whole as laid. Thus where the prisoner was indicted for having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt, Bayley J. told the jury that if they were of opinion that the defendant had published the libel with *either* of those intentions, they ought to find the prisoner guilty. *Rex v. Evans*, 3 Starkie N. P. C. 35. If a prisoner is charged with obtaining an order for a certain sum from the prosecutor with intent to defraud him of the *same*, he may be legally convicted, though it appears that his real intention was to cheat the prosecutor out of a small portion only of the proceeds of the order. *Regina v. Leonard*, 1 Denison C. C. 304. Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her, and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention carnally to know her, Holroyd J. held that the averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse, simply.

<sup>1</sup> S. P. in *Rex v. Williams*, 2 Campbell, 646, Lawrence J.

<sup>2</sup> S. P. in *Rex v. Middlehurst*, 1 Burrow, 400, Lord Mansfield.

Rex v. Dawson, 3 Starkie N. P. C. 62. Commonwealth v. Fischblatt, 4 Metcalf, 354. See Commonwealth v. Lang, 10 Gray, 11. So, of an alleged intent to defraud A., where the proof is an intent to defraud A. and B. The State v. Veazie, 7 Greenleaf, 131.

On an indictment on the 7 Geo. III. ch. 50, § 1, alleging the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either was held sufficient. Rex v. Ellins, Russell & Ryan C. C. 188. And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. An indictment for embezzling need not specify the exact sum embezzled; as where the indictment charged the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one-pound notes in the sum of money embezzled, this was held to support the indictment. Rex v. Carson, Russell & Ryan C. C. 303. Where an information for publishing a libel contained an averment that outrages had been committed *in and near* the neighborhood of Nottingham, it was held that the averment was divisible, and that it was sufficient to prove that outrages had been committed in either place. Rex v. Sutton, 4 Maule & Selwyn, 532. Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt C. J. at the trial in Rex v. Burdett, 1 Lord Raymond, at p. 149.

It is to be observed that, in order to convict of any offence which is not the offence primarily charged in the indictment, it is necessary that the minor offence should be substantially charged in the indictment. Thus where an indictment alleged that the prisoners feloniously made an assault on the prosecutor, and feloniously and violently did "rob, steal, take, and carry away from his person certain money and goods," and the jury found that the prisoners assaulted the prosecutor with intent to rob him, it was held that the conviction could not be sustained at common law, because the indictment contained no statement of an intent to rob. Jervis C. J.: "There is the case of an indictment for burglary which comprehends in its statement an indictment for house-breaking, and generally for larceny from the house; it has been contended that the party might be convicted of intending to steal; but it was decided in Vandercomb's Case, 2 Leach C. C. 708; 2 East P. C. ch. 15, § 29, p. 519, that in an indictment for burglary and stealing you could not find the party guilty of intending to steal. If that be the true criterion you must look at the indictment, and strike out that portion of it which the jury have negatived. The jury here have struck out that he did violently seize and carry away the goods, and have thereby left the assault only, and not an assault with intent to rob. It is said, in addition, that 'robbery' is a word of art which includes the intent; I do not think that can be maintained. The mere insertion of the words 'rob' or 'robbery,' in the indictment, cannot be taken to have that effect. The conviction cannot therefore be sustained at common law, because the jury have found the prisoners guilty of a felony which is not charged in the indictment." Regina v. Reid, 2 Denison C. C. 88.

It remains to consider how far averments, charging *defendants with a joint offence*, are divisible. These averments of joint offences are divisible (as to the degree of criminality in the several persons charged), where the offence is

of such a nature as that the defendants may act a different part in the transaction; and if the evidence affects them differently, the judge may select such parts as are applicable to each, and leave their cases separately to the jury. And it was, accordingly, held by a majority of the Judges, in the case of *Butterworth, Braithwaite, and Moss, Russell & Ryan C. C. 520*, who were indicted for a burglary, in breaking into the dwelling-house of W. K. in the night-time, *and stealing therein to the value of 40s.*, that upon such an indictment the offence of one might be aggravated by burglary in him alone; because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking; and, accordingly, there was judgment against Moss for the burglary and capital larceny, and against the other two for the capital larceny. But it is important to observe, says Gabbett (2 Crim. Law, 416) first, that this was a *single* or continuing transaction, in which *all* the defendants joined or co-operated; and, secondly, that the judgment, as against all the prisoners, was for a capital felony, and *the same*; and it is distinguishable, in these respects, from the case of *Mary and John Messingham* where the defendants were charged jointly with receiving stolen goods; and it was decided, on a case reserved, that as on this joint charge it was necessary to prove a joint receipt, and as it appeared from the evidence that *Mary Messingham* was absent when *John Messingham*, her son, received the goods, her receipt afterwards was to be considered as a *separate* transaction, and the conviction therefore wrong. 1 Moody C. C. 257. In such case, as several persons cannot be convicted of distinct felonies which are charged in the indictment as a joint felony, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. *Regina v. Dovey*, 2 Denison C. C. 86; 4 Cox C. C. 428. *Regina v. Matthews*, 1 Denison C. C. 596. *Regina v. Reardon*, Law Rep. 1 C. C. 31. *Commonwealth v. Slate*, 11 Gray, at pp. 63, 64. And the case of *Butterworth, Braithwaite, and Moss*, *supra*, is also to be distinguished from the case of *Hempstead and Hudson, Russell & Ryan C. C. 344*, where there was no evidence to show that the articles which they were charged with stealing jointly, from the dwelling-house of J. B., were not taken by the prisoners at different times and unknown to each other (though the property was found upon them all at one time; and the prisoners were in the same room together); and the jury, therefore, found *Hempstead* guilty of stealing to the value of six pounds, and *Hudson* guilty of stealing to the value of ten shillings (which the goods found upon them, respectively, were worth), by which the prisoners would be subject to two distinct judgments—the one for a capital offence, the other for simple larceny. The Judges were of opinion that, upon this finding, judgment could only be given against one, — upon a *nolle prosequi* being entered as to the other, who stood second upon the indictment.

It was held in *Rex v. Turner*. 1 Siderfin, 171, where several were jointly indicted for a burglary, that the jury could not find one guilty of burglary and the other of larceny only; “but there the very nature of the case,” says Starkie, 1 Crim. Pl. (2d ed.) 38, “precluded such a finding, for the evidence was the same as to all.” In accordance with the decision of the majority of the Judges in the case of *Butterworth, Braithwaite, and Moss*, *ubi supra*, is the rea-

soning of Starkie, 1 Crim. Pl. (2d ed.) 38. He there says: "In the case of burglary, if it appeared in evidence that one of the prisoners, who had assisted in the removal of the goods, had been a stranger to the breaking in, and had taken no part in the transaction until after the breaking had been accomplished; there seems to be no satisfactory reason why the jury should not find according to the fact, and why separate judgments should not be pronounced, as if the prisoners had been separately tried and convicted." An analogous case is the conviction of one for murder and another for manslaughter, on an indictment for murder. *Rex v. Salisbury, Plowden*, 97.

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REX v. HAINES.<sup>1</sup>

Easter Term 1821.

*Burglary — Actual and Constructive Breaking.*

The pulling down the sash of a window which has no fastening, and is only kept in its place by a pulley weight, is a sufficient breaking to constitute burglary. It is equally a breaking, although there is an outer shutter which is not closed and fastened.

THE prisoners were tried and convicted before Mr. Justice Richardson, at the Old Bailey sessions, February 1821, for burglariously breaking and entering the dwelling-house of Richard Plunkett, with intent to steal the goods and chattels in the same dwelling-house then being.

The evidence was satisfactory as to the fact; but a doubt arose whether the breaking was sufficient in point of law to constitute burglary.

The prisoners were found in the front parlor of the prosecutor's house, about a quarter past five o'clock in the evening of the 16th of January 1821. It was then quite dark. It appeared that they had entered through the upper part of the window, which the prosecutor had closed a short time before, and which the prisoners had opened by pushing down the upper sash.

There was a fastening to the lower sash, but none to the upper sash, which, during the daytime, was usually kept closed by the pulley weight only.

There was an outside shutter to this window, which was usually closed and fastened about dark by the sons of the prosecutor, on

<sup>1</sup> Russell & Ryan C. C. 450.



their return from school ; but on the evening in question, the closing the outer shutter was delayed, in consequence of the children returning later than usual from school.

The question was, whether the pushing down of the upper sash by the prisoners, in the manner stated, amounted to a sufficient breaking.

In Easter term 1821 the Judges met and considered this case. They were unanimously of opinion, that the pulling down of the sash was a sufficient breaking, and the prisoner was rightly convicted.

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REX v. RUSSELL.<sup>1</sup>

Easter Term 1833.

*Burglary — Actual and Constructive Breaking.*

Lifting the flap of a cellar usually kept down by its own weight, is a sufficient breaking for the purpose of burglary.

THE prisoner, George Russell, was tried and convicted before Mr. Justice LITTLEDALE, at the Old Bailey sessions in May 1833 (present also Baron BOLLAND and Mr. Justice BOSANQUET) for burglary, in breaking and entering the dwelling-house of James Grady, in the parish of St. George, Hanover Square, on the night of the 21st of April last, with intent to steal the goods and chattels in the dwelling-house.

The prisoner got into the house between the hours of eleven o'clock at night and one in the morning. The jury found the intent to steal ; but there was a question, whether there was such a breaking as constituted that ingredient of burglary.

There is a cellar under the house which communicated with the other part of it by an inner staircase. The entrance to the cellar from the outside was by means of a flap, which let down ; the flap was made of two-inch stuff, but that was reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising up the flap door. The flap door had been from time to time fastened with nails, when the cellar was not wanted, to keep coals in.

<sup>1</sup> 1 Moody C. C. 377.

A good deal of evidence was given, as to whether, on the night in question, the door was nailed down, and the learned judge desired the jury to find whether it was so or not. They found that it was not nailed down that night.

The case very much resembles Callan's Case, in Russell & Ryan C. C. 157, and 2 Russell on Crimes, 5, in which the Judges were equally divided in opinion; vide also the Case of William Brown, 2 East P. C. 487.

In Easter term 1833 the Judges met and considered this case. They were of opinion that there was a sufficient breaking, and that the conviction was right.

There must be a breaking of the house either, (1) actual; or (2) constructive. There must be a breach of the house made or produced by the act of the felons, and this either by actual force or construction of law.

I. An *actual* breaking for the purposes of burglary is to be distinguished from a breaking in law; for, as Hale says (1 P. C. 551) every one that enters into another's house against his will, or to commit a felony, though the doors be open, doth in law break the house. And formerly, he goes on to say, and even in the remembrance of some who were living in his own time, Sir Nicholas Hide C. J. did hold that a breaking in law was sufficient to make a burglary; as if a man entered into the house by the doors, open in the night, and stole goods, yet this was burglary; but the law is, he concludes, that a bare breaking in law, namely, an entry by the doors or windows open, is not sufficient to make burglary without an actual (or constructive) breaking. If the door of a mansion-house stand open, and the thief enter into the house with a purpose to steal, this is a breaking of the house in law, and yet no burglary. Kelyng, 70. So it is if the window of the house be open, and a thief, with a hook or other engine, draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house.

So also if one enter by a door or window, open in the daytime, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary. 1 Hawkins P. C. ch. 38, § 4. But if, having entered the house at night by an open door or window, he turns the key of a door of a chamber, or unlatcheth a chamber door, with intent to commit felony, he is guilty of burglary. 1 Hale P. C. 553. The State v. Wilson, Coxe, 439. And so he would be, if, having entered by an open door or window in the daytime, he at night were to unfasten an inner door for the purpose of committing felony. Or if being lawfully within the house, he did the same.

Where a servant opened his lady's chamber door, which was fastened by a spring lock, for the purpose of committing a rape upon her, he was held guilty of burglary. Gray's Case, 2 East P. C. 488; 1 Strange, 481. So also where the prisoner entered at a back door of the house of W. Hughes, at Newington, which had been left open by the family, and afterwards broke open an inner door, and stole goods out of the room, and then unbolted the street door on the inside, and went out. Johnson's Case, 2 East P. C. 488. This was held

burglary by all the Judges. There was, however, a clear burglary upon the statute in this case, the prisoner breaking out of the dwelling-house. "The servant lay in one part of the house, and the master in another, and the stair-foot door of the master's chamber was latched; the servant came in the night, and unlatched the stair-foot door, and went up into the master's chamber, intending to kill him; this was held burglary." 1 Hale P. C. 554. And where the prisoner burst open an inner door in the inside of a house, and so entered a shop in order to steal money from the till, it was held that this was a sufficient breaking to support an indictment for house-breaking. *Regina v. Wenmouth*, 8 Cox C. C. 348, Keating J.

So where the prisoners went into the house of the cook at Sergeants' Inn, in Fleet Street, to eat, and, taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest and stole plate, it was agreed that the picking open the lock of the chamber door ousted them of their clergy, though the breaking open the chest would not have done so." Anonymous, 1 Hale P. C. 524.

"If A. be a lodger at an inn, and he goes up to his chamber to bed, and the chamberlain pulls to the door and latcheth it, or A. himself locks it, and in the night he riseth, openeth his chamber door, steals goods, and goeth away, it may be a question, says Hale, whether this be burglary; it seems not, because he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house; but if he had opened the chamber of B., a lodger in the inn, to steal his goods, this had been burglary." 1 Hale P. C. 554. But if the lodger had in the first case opened the door of the inn, as he went out, he would have been guilty of breaking out under the statute. *Regina v. Wheeldon*, 8 Carrington & Payne, 747, Erskine J., post p. 64.

From what has been said, it may be inferred that some violence is necessary to constitute the actual breaking of a house, though very slight violence is necessary.

If one unlatches a door, opens a window when fastened, or raises it when shut, but being without any fastening, puts back a lock or a bolt, or picks a lock with a false key, takes a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by unloosing any other fastening, either to doors or windows, which the owner has provided, all these are burglarious breakings. 2 Russell on Crimes, 2, 3. 4th ed. But where a pane of glass had been cut or cracked for a month, but there was no opening or hole whatever, as every portion of the glass remained exactly in its place, and the prisoner was both seen and heard to put his hand through the glass; this was held a sufficient breaking. *Rex v. Bird*, 9 Carrington & Payne, 44, Bosanquet J. So where a window, opening upon hinges, is fastened by a wedge, so that pushing against it will open it, if such window be forced open by pushing against it, there will be a sufficient breaking. The prisoner was tried and convicted before Mr. Justice Bayley, at the York Spring assizes 1818, of burglary; but, upon a doubt as to the question of breaking into the house, the learned judge saved the point for the consideration of the Judges. The prisoner entered the house by lifting up a large iron grating, which was placed over the prosecutor's cellar, and opening a window in a passage leading from that cellar. The cellar opened into a passage which led into the house, and

the window was within the wall of the house; the cellar was beyond the walls. The grating weighed eight stone, and was usually fastened inside by a large iron chain; but it was not so fastened at the time the prisoner entered. The grating was for the admission of light only, not of goods. The window opened upon hinges, and was fastened by two nails, which acted as wedges; but, notwithstanding, these nails would open by pushing. It was argued that the lifting up the grating was no breaking, because it was kept down by its own weight only, and that the forcing open the window was no breaking, because it was done by pushing only. The learned judge thought the forcing of the window was a breaking, but he reserved the point for the consideration of the Judges. In Easter term 1818 the Judges met; they held the conviction right, being of opinion that the forcing the window in the manner described was a sufficient breaking into the dwelling-house. *Rex v. Hall, Russell & Ryan* C. C. 355.

If a window be partly open, but not sufficiently so as to admit a person, the raising it higher so as to admit any one, is not a breaking. *Rex v. Smith*, 1 Moody C. C. 178. *Rex v. Hyams*, 7 Carrington & Payne, 441, per Park J. and Coleridge J. Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken, this was ruled burglary by Ward C. B., Powis J. and Tracy J. and the Recorder. But they thought that the extremity of the law; and on a subsequent conference, Holt C. J. and Powell J. doubting and inclining to another opinion, no judgment was given. *Roberts's Case*, 2 East P. C. 487.

In *Commonwealth v. Stephenson*, 8 Pickering, 354, the evidence as to breaking was, that in the evening of May 22, the witness fastened the outer door of the dwelling-house by turning a button down upon the latch, and that about day-break in the morning, he found the door open, and also that the network of the buttery window had been cut away and torn down. The netting was made of double twine, and was fastened by nailing it on each side, and at the top and bottom of the window, for the purpose of letting in the air, and keeping out cats and other smaller animals. Within the network there was a glass window, which had not been shut. Putnam J. instructed the jury, that if the defendants broke, cut, or tore away the net so fastened, it was in law a breaking of the dwelling-house. The defendants being found guilty, moved for a new trial because the foregoing instruction was wrong. Parker C. J. delivered the opinion of the court: "The question in this case is, whether there was a breaking or not. The lifting a latch and opening the door, though not bolted or locked; the shoving up a window, though not fastened; the getting down a chimney, and various other acts done to effect an entry, are held to be a breaking. See *The State v. Wilson*, Cox, 439; *Commonwealth v. Steward*, 7 Dane's Ab. 136. The offence consists in violating the common security of a dwelling-house, in the night-time, for the purpose of committing a felony. It makes no difference, whether the door is barred and bolted, or the window secured, or not; it is enough that the house is secured in the ordinary way; so that by the carelessness of the owner in leaving the door or window open, the party accused of burglary be not tempted to enter. Shutting the window-blinds and leaving the windows open for air, is a common mode of closing a house in the warm season; if the blinds are forced, it is a breaking. The objection is, that the lattice-work of the dairy window was of twine only. Suppose it were of wire,

or thin slats of wood, would there be any difference? This network was nailed down on all sides; it was torn away by the defendants, and they entered by the breach. This is quite sufficient to constitute a burglarious breaking and entry.

But where the only covering to an open space in a dwelling-house was a cloak hung upon two nails at the top, and loose at the bottom, and it was removed from one of the nails, it was queried whether that was a sufficient breaking. *Hunter v. The Commonwealth*, 7 Grattan, 641.

If the window of a house be open, or if there be an aperture in the wall, roof, or cellar, to admit light or air, through which a thief enters in the night to commit felony, this is no burglarious breaking. *Rex v. Lewis*, 2 Carrington & Payne, 628. *Rex v. Spriggs*, 1 Moody & Robinson, 357. *The State v. Boon*, 3 Iredell, 244. In *Rex v. Spriggs*, Bosanquet J. said: "If a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking." But where a square of glass in a kitchen window, through which the prisoners entered, had been previously broken by accident, and half of it was out when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement; Mr. Justice Alderson and Mr. Justice Patteson, entertaining a doubt from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing, from the enlarging an aperture by lifting up the sash of a window (as in *Rex v. Hyams*, ante p. 47) submitted the case to the Judges, who were unanimously of opinion that this was sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. *Rex v. Robinson*, 1 Moody C. C. 327. And it has since been laid down as clear law that a person, who, on finding a hole in a door, or pane of glass, puts his hand in through the hole to remove the fastening, of the door or window, and so gains admittance into the premises, is guilty of a breaking into the house. *Ryan v. Shilcock*, 7 Exchequer, 72, per Curiam.

But if there be in the roof or cellar, or wall of a house, an aperture large enough to admit a person, which has a fastening covering the aperture by its own weight, but without any lock, bolt, or bar, or with any bolt, lock, or bar, but unfastened at the time; this, after some fluctuations of opinion, has been held to be burglary. On an indictment for burglary in the house of G. Aldridge, it appeared that the place which the prisoners entered was a mill under the same roof, and within the same curtilage as the dwelling-house. Through the mill was an open entrance or gateway, capable of admitting wagons, and intended for the purpose of loading them more easily with flour, through a large aperture or hatch communicating with the floor above. This aperture was closed by folding doors, with hinges, which fell over it, and remained closed by their own weight, but without any inferior fastening; so that those without, under the gateway, could push them open at their pleasure by a moderate exertion of strength. In this manner the prisoner was proved to have entered the mill in the night, with the evident intention of stealing the flour; and Buller J. held this a sufficient breaking to constitute the offence. *Brown's Case*, 2 East P. C. 487.

The prisoner was tried before Lord Ellenborough, at the Old Bailey Sessions, November 1809, on an indictment charging him with having stolen three glass bottles and five pints of wine, the property of Dennis Malony, in his dwelling-house, and with having, after committing such felony, burglariously broken out of the said dwelling-house. The only question in the case (for the larceny, time of night, and all the other circumstances necessary to be proved in such a case were clearly made out), was, whether there was a sufficient breaking to constitute the crime of burglary. The wine was stolen from a bin in the cellar belonging to the dwelling-house of Malony the prosecutor, who kept a public-house, and it had been removed by the prisoner from thence to the flap by which the cellar was closed on its outside next to the street. The flap had bolts belonging to it by which it might have been bolted within, but whether it was so bolted on the night of the burglary did not appear; but it was clearly proved that the flap was down. It did not appear whether the prisoner had entered by the flap of the cellar or not, as a door which communicated with the cellar in another direction, and which the prosecutor had left locked, was found broken open. The probability therefore was, that the prisoner had entered that way; but if he had entered by raising up the flap, it would (unless prevented) have closed after him by its own weight, and in order to get out after it had so closed, it would have required the degree of force necessary to lift up such a flap to be applied to it. The flap was a large one, being made to cover the opening of a cellar through which the liquors, consumed in the public-house, were usually let down into the cellar. The prisoner, when first discovered, had his head and shoulders out of the flap of the cellar, and upon being seized, made a spring and got out and ran away; he was immediately pursued, caught and brought back, and the flap, through which he had got, was found fallen down and closed. Upon this evidence the jury found him guilty; but Lord Ellenborough reserved the question, as to the sufficiency of the breaking out in this case to constitute burglary, for the consideration of the Judges. In Michaelmas term 1809, all the Judges met, when Lord Ellenborough C. J., Mansfield C. J., Heath J., Grose J., Chambre J. and Wood B. thought this was a sufficient breaking, because the weight was intended as a security, this not being a common entrance; but the other Judges, namely, Macdonald C. B., Bayley J., Graham B., Le Blanc J., Lawrence J. and Thomson B. thought the conviction wrong. *Rex v. Callan, Russell & Ryan C. C. 157.*

It has been held, that getting out of a house by pushing up a trap-door, which was merely kept down by its own weight, and on which fastenings had not at that time been put, but the old trap-door, for which this new one had been substituted, had been secured by fastenings, was *not* a sufficient breaking of the house. *Rex v. Lawrence, 4 Carrington & Payne, 231, coram Bolland B.* This case, however, seems to have been overruled by *Rex v. Russell*, post, p. 66.

The breaking must be of *some part* of the house. Therefore where the prisoner opened an area gate with a skeleton key, and thence passed through an open door into the kitchen, it was unanimously held, on the question being raised, that as there was no free passage in time of sleep from the area into the house, the breaking of the area gate was not a breaking of the dwelling-house. *Rex v. Davis, Russell & Ryan C. C. 322.*

In Massachusetts, in an early case, it was proved that the goods stolen were

found in the dwelling-house of Trimmer, one of the defendants, in whose family the other defendant, Whitney, resided; that the store from which the goods were stolen, was a room (of the dwelling-house) in the occupation of the persons whose goods were stolen, and the goods found were concealed in another room of the house, between which and the room from which they were taken, there was a vacant unoccupied room, and through which Whitney and the wife of Trimmer passed and entered the store, by removing a plank in the partition; the plank was not fixed or fastened, but was so loose that it could be slid back and forth. The court, Sedgwick, and Sewall JJ. doubted whether there was such a breaking proved, the plank being loose, and having no fastening, as to bring the case within the statute, and directed the jury to acquit of that part of the charge, and to convict of the simple larceny only. *Commonwealth v. Trimmer*, 1 Massachusetts, 476.

Where the prisoner broke open a box, used as a shutter box, which partly projected from the wall of the house, and adjoined one side of the window of the shop, which side of the window was protected by wooden panelling, lined with plates of iron, it was held, that the shutter box was no part of the dwelling-house. *Rex v. Paine*, 7 Carrington & Payne, 135. Upon this case Mr. Greaves, the learned editor of Russell, observes: "It is not stated whether the box had any communication with the inside of the house, or whether the breaking was such as to make an opening into the house." 2 Russell on Crimes, 6. 4th ed. It is submitted, that had there been such communication, or such opening into the dwelling-house, it would have been clearly burglary, subject to the proof of entry by the arm or hand of the prisoner. *Rex v. Davis*, Russell & Ryan C. C. 322.

On the same principle it was holden that the breaking of an outward gate, part of the outward fence of the curtilage of a dwelling-house, and which opened not into any building, but into the yard only, was not a breaking of the dwelling-house. *Rex v. Bennett*, Russell & Ryan C. C. 289. Hale certainly, in his Pleas of the Crown, draws rather a refined distinction between an actual *breaking* of the wall surrounding the dwelling-house, and an overleaping of it. After citing 22 Assize, 95, which defines burglary as being "to break houses, churches, walls, courts, or gates, in time of peace," says: "By that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night breaks a wall or the gate thereof, and finding the doors of the house open, he enters into the house, this is burglary, but otherwise it had been if he had come over the wall of the court, and found the door of the house open, then it had been no burglary." 1 Hale P. C. 559. Upon this passage of Hale, a commentator, Sergeant Wilson, has the following note: "This (namely, the definition of burglary as extended to walls and gates) was anciently understood only of the walls or gates of the city. See Spelman in verbo Burglariâ, murorum portarumve civitatis aut burgi. If so, it will not support our author's following conclusion, wherein he applies it to the wall of a private house." And East, remarking on this passage of Hale, says: "At any rate the distinction between breaking and coming over the wall or gate is very refined; for if it be part of the mansion, and be enclosed as much as the nature of things will admit of, it seems to be immaterial whether it be broken or overleapt, and more properly to fall under the same consideration as the case of a chimney. And if it be not part of the mansion-house for this purpose, then whether it be broken or not

is equally immaterial; in neither case will it amount to burglary." 2 East P. C. 488. In Russell on Crimes, II. p. 788, 3d ed., East's opinion is adopted, and the statute 7 & 8 Geo. IV. ch. 29, § 23, having, as will be seen hereafter, excepted all buildings within the curtilage from being subject to burglary, except under certain conditions, no question can any longer be raised, as to whether the actual breaking of a wall surrounding the dwelling-house can render the offender liable as for a burglarious breaking.

It was formerly doubted, whether to descend a chimney into a dwelling-house would be burglary. Hale seems to have entertained this doubt, although Manwood C. B. had held that it was. Dalton Just. 151. He says: "There was one arraigned before me at Cambridge for burglary, and upon the evidence it appeared that he crept down a chimney. I was doubtful whether this were burglary, and so were some others; but upon examination it appeared, that in his creeping down some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question, and direction was given to find it burglary; but the jury acquitted him of the whole fact." 1 Hale P. C. 552. It was, however, afterwards fully established that the coming down the chimney was a breaking to establish burglary, and for this reason, namely, because it was as much closed as the nature of the thing would bear. 1 Hawkins P. C. ch. 38, § 4. 4 Bl. Comm. 226. 2 East P. C. 485. It has since been held that getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house. The prisoner was tried before Mr. J. Burrough at the Dorset Lent Assizes 1821, for burglariously breaking and entering the dwelling-house of George Smith, with intent feloniously to steal the goods and chattels of the said George Smith therein being. It appeared by the evidence of the wife of the prosecutor that whilst sitting in a room adjoining the shop (part of the dwelling-house of her husband), in which were various goods, the stock of her husband's trade, she heard, about twelve o'clock at night, a noise in the shop; that she took a candle, and went into the shop, and perceiving some soot fall from the chimney, she looked up, and saw a man lying across the chimney, just above the mantel-piece. It appeared that the man had not otherwise been in the shop, and the chimney had no communication with any other room in the house. An alarm was made, and a man, who proved to be the prisoner, was immediately seen to come out at the top of the chimney. He was pursued, and immediately apprehended. He was by trade a chimney-sweeper, and had shortly before been employed by the prosecutor to sweep the chimney of the shop, and also that of the sitting-room, being all the chimneys in the house. The learned judge not being satisfied that the evidence was sufficient to support the charge of breaking and entering into the dwelling-house, desired the jury to consider whether they were satisfied that the prisoner's intention was to steal goods in the shop, and if they thought so, he advised them to find him guilty; and he informed them that he should reserve the other point for the consideration of the Judges. The jury found the prisoner guilty. On a case reserved, ten of the Judges, namely, Best J., Garrow B., Park J., Bayley J., Wood B., Graham B., Richards C. B., Dallas C. J., Abbott Ld. C. J. held the conviction right. They were of opinion that the chimney was part of the dwelling-house; that the getting in at the top was a breaking of the dwelling-house; and that the prisoner, by lowering him-



self in the chimney, made an entry into the dwelling-house. Holroyd J. and Burrough J. thought the prisoner could not be said to have broken and entered the dwelling-house, until he was below the chimney-piece. *Brice's Case*, Russell & Ryan C. C. 450, 451.

The breaking open of a movable chest or box in the dwelling-house, does not of itself constitute a breaking for the purposes of burglary. "If A. enters into the house of B. in the night, by the doors open, and breaks open a chest, or takes away goods without breaking open an inner door, this is no burglary, because the chest is no part of the house." 1 Hale P. C. 554. Kelyng, 69. Foster, 108. 2 East P. C. 488. *The State v. Wilson, Coxe*, 439.

Whether the breaking open a cupboard or locker let into the wall of a dwelling-house be a burglarious breaking, appears never to have been solemnly decided. "At a meeting of the Judges upon a special verdict in January, 1690, they were divided upon the question, whether breaking open the door of a cupboard let into the wall of the house, was burglary or not." Foster, 108. Lord Hale in one passage hesitatingly says, that it is burglary. "If A. breaks open a study or counting-house, or shop within the house, this is burglary, though none usually lodge in the study; and the same law seems to be, if he breaks open a cupboard or counter fixed to the house," to this he adds a "*quære*." 1 Hale P. C. 555. In another passage treating of house-breaking in the daytime, he says: "Some breaking or force will oust clergy upon the statutes of 5 & 6 Edw. VI. and 39 Eliz. which will not make a burglary, if it were in the night, as where he enters by the doors open, and breaks open a counter or cupboard fixed to the freehold, as was agreed in the '*Cambridgeshire Case*.'" 1 Hale P. C. 527, mentioned in another part of his work. See also another account of this case in 2 Hale P. C. 358, where he says: "By the advice of all the Judges of England, he was ousted of his clergy upon the statute 39 Eliz. for the taking goods out of the chest to the value of 5s. was felony." This *Cambridgeshire Case* was *Simpson's Case*, Kelyng, 31; and according to Hale's own account in the very next passage, the reason why he was ousted of his clergy on the 39 Eliz. had no reference to the breaking of the chest, but to the removal of the goods from it. "T. 16 Car. II. *Simpson's Case*, which was thus: A man came into a dwelling-house, none being within, and the doors being open, and broke up a chest, and took up goods to the value of 5s., laid them on the floor, and before he could carry them out of the chamber he was apprehended, and *upon this matter specially found* he was ousted of his clergy, upon the statute 39 Eliz. for the taking them out of the chest was felony by the common law, and the statute 39 Eliz. did not alter the felony, but only excluded clergy, per omnes justiciarios Angliæ. But whereas in that case the breaking open of the chest was held such a force or breaking, as excludes clergy upon that statute, I have observed that the constant practice at Newgate hath not allowed that construction, unless it was a *counter or cupboard fixed*; yet note, this resolution of 16 Car. II. was by all the Judges of England then present, and though one dissented, he after came about to the opinion of the rest, *ideo quære*." 1 Hale P. C. 527. In another part of the same work, he gives the true account of this case: "It was ruled 16 Car. II. B. R. upon a special verdict found in *Cambridgeshire*. A. comes into the dwelling-house of B., nobody being there, and breaks open a chest, and takes out goods to the value of 5s. and lays them on

the floor of the same room, and is apprehended before he can remove them; he was indicted upon the statute 39 Eliz. and ousted of his clergy by the advice of all the Judges except one; for the taking out of the chest was felony by the common law, and the stat. 39 Eliz. ch. 15, alters not the felony, but ousts only the clergy." 1 Hale P. C. 508. Therefore, as Foster clearly shows, Simpson's Case does not warrant the inference of Hale in the former passages cited, that though breaking a cupboard fixed to the freehold is not burglary at common law, it may be house-breaking within the statute 39 Elizabeth. "Simpson's Case," remarks Foster, "as truly stated by Hale in one part of his work, and by Kelyng, doth not, in my opinion, warrant any such distinction. It did not, nor possibly could, turn on the circumstance of breaking a chest or fixed cupboard, or any thing like it. Nor doth it appear from the state of the case, that there was the least occasion to refer to any such constructive breaking; for, in fact, both outer and inner doors were broken open. The case, in my opinion, turned singly on this point. The man had broken open the chest, and brought the goods into the hall, in order to carry them off, but was apprehended in the house. It was made a question, whether this amounted to a stealing *in* the house within the 39 Eliz. and it was holden that it did, the man had once possessed himself of the goods *animo furandi*." Gibbon's Case, Foster, 109. Sergeant Wilson, too, in a note upon another passage of Lord Hale, 2 P. C. 358, where he mentions another fact in the case, namely, that the *chamber door* was broken open, says: "The question about the chest or trunk seems to have been only with relation to the taking away; whether the taking goods out of a chest, and laying them on the floor without carrying them out of the chamber, was a taking away or stealing within the statute, and not whether it was a robbery, for if it were a stealing, *that* (namely, the robbery) would be clear, by the breaking open the chamber door." Let us, however, hear Kelyng's report of the case, which will fully establish all that we have said. "At the Lent assizes, at Cambridge, 16 Car. II., Clement Simpson was indicted for breaking an house in the daytime, nobody being in the house, and stealing plate to the value of £10. And upon the evidence it appeared, that he had taken the plate out of a trunk in which it was, and laid it on the floor; but before he carried it away, he was surprised by people coming into the house. And the Chief Justice, Hyde, caused this to be found specially, because he doubted, upon the statute of 39 Eliz. ch. 15, which enacts, that if any one be found guilty of the felonious taking away goods, &c. out of any house in the daytime, above the value of 5s., he should not have the benefit of his clergy, whether this were a taking away within the statute. And on the 13th June Car. II., all the Judges being met together, this question was propounded to them, and agreed that clergy was taken away in this case. For the statute of 39 Eliz. does not go about to declare what shall be felony, but to take away clergy from that kind of felony; for breaking an house in the daytime, nobody being therein, and stealing goods above the value of 5s.<sup>1</sup> is felony at common law. And by the common law, breaking the house and taking of goods, and removing them from one place to

<sup>1</sup> I have altered the passage in Kelyng, says Wilmot, *Law of Burglary*, p. 34, which is as follows: "But to take away clergy from that kind of felony. For breaking an house in the daytime, nobody being therein, and stealing goods to the value of 5s. so that the felony is at common law."

another in the same house, with an intent to steal them, is felony; for by this taking them he hath the possession of them, and that is stealing and felony. *Simpson's Case*, Kelyng, 31.

Foster, having pointed out this slight inaccuracy of Lord Hale, goes on to express his opinion, that the breaking open of cupboards attached to the freehold cannot constitute burglarious breaking. "With regard," says that very eminent authority, "to cupboards, presses, lockers, and other fixtures of the like kind, I think we must, in favor of life, distinguish between cases relative to mere property, and such wherein life is concerned. In questions between the heir or devisee and the executor, those fixtures may, with propriety enough, be considered as annexed to and parts of the freehold. The law will presume that it was the intention of the owner, under whose bounty the executor claimeth, that they should be so considered; to the end that the house might remain to those who, by the operation of law, or by his bequest, should become entitled to it in the same plight he put it, or should leave it entire and undefaced. But in capital cases, I am of opinion, that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere movables, partaking of the nature of those utensils, and adapted to the same use." Foster, 109. The point does not appear to have since arisen, but were it to occur, doubtless the opinion of so great a judge would be entitled to the highest respect. See 2 Russell on Crimes, 7. 4th ed.; 2 East P. C. 489. And, perhaps, we may be allowed to suggest another reason why such a breaking should not be burglarious, namely, that as a general principle, the actual breaking of the dwelling-house has reference to the entry at common law, or to the escape of the intruder by breaking out under the statute. Whereas the breaking of a cupboard is a distinct and independent act. In *The State v. Wilson*, Coxe, 439, 441, Kinsey C. J. said: "If, however, all the doors be open, and the thief enters through an open door, and after getting into the house should break open a chest, or a cupboard, *even fixed in the wall*, this is not such a breaking as the law requires."

In Ohio it has been held under a statute of that State, making it an offence to "forcibly break and enter" a building, that actual force is not necessary, but that a breaking at common law is sufficient. *Ducher v. The State*, 18 Ohio, 308.

II. If there be no *actual* breaking there must be a breaking by *construction of law*, as where any one by fraud, conspiracy, or threats, procures the door of a dwelling-house to be opened to him.

"Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary." 3 Inst. 64. 1 Hale P. C. 552. "This," writes Hale, "happened in Blackfriars, 1664, where thieves pretending that A. harbored traitors, called the constable to go with him to apprehend them, and the constable entering, they bound the constable and robbed A. and were executed for burglary, and yet the owner opened the door of his own accord to the constable." 1 Hale P. C. 553. Crompton, 22 a.

Where divers persons came to a house with intent to rob it, and knocked

at the door, pretending to have business with the owner, and being by that means let in, rifled the house, they were guilty of burglary. 1 Hawkins P. C. ch. 38, § 5.

“At the sessions,” says Kelyng: “I inquired of *Le Mott’s Case*, which was adjudged in the time of the late troubles, and my brother Wyld told me that the case was thus: that thieves came with intent to rob him, and finding the door locked up, pretended they came to speak with him, and thereupon a maid-servant opened the door, and they came in and robbed him, and this being in the night-time, this was adjudged burglary, and the persons hanged; for their intention being to rob, and getting the door open by a false pretence, this was in *fraudem legis*, and so they were guilty of burglary, though they did not actually break the house; for this was in law an actual breaking, being obtained by fraud to have the door opened; as if men pretend a warrant to a constable, and bring him along with them, and under that pretence rob the house, if it be in the night, this is burglary.” *Le Mott’s Case*, Kelyng, 42.

“Nor were those less guilty,” says Hawkins, “who, having a design to rob a house, took lodgings in it, and then fell on the landlord and robbed him; for the law will not endure to have its justice defrauded by such evasions.” 1 Hawkins P. C. ch. 38, § 5.

“At the jail delivery in the Old Bailey, 10th of October 1666, Thomas Cassy and John Cotter were indicted for robbing William Pinkney, a goldsmith, by the Temple Bar, in his house near the highway, in the night-time, and stealing several parcels of plate and other things from him. And they were also indicted for the same offence for burglary, for breaking his house in the night, and stealing his plate, and on both these indictments they were arraigned and tried; and upon the evidence the case appeared to be, that Cotter was a lodger in the house of the said Pinkney, and knowing that he had plate and money to a good value, he combined with the aforesaid Cassy, and one John Barrington, and Gerrard Cleashard, and they three contrived that one of those three should come as servant to the other to hire lodgings there for his master and another gentleman; and Cotter told them that Pinkney was one who constantly kept prayers every night, and they could not have so good an opportunity to surprise him as to desire to form in prayer with him, and at that time to fall on him and his maid, there being no other company in the house; and accordingly one of them came on Saturday in the afternoon and hired lodgings there, pretending it to be for his master and another gentleman of good quality, and about eight o’clock at night they all came thither, two of them being in very good habit, and when they were in their chamber they sent for ale, and desired Pinkney to drink with them, which he did; and whilst they were drinking Cotter came into his lodging, and they hearing one go up stairs, asked who it was, and Pinkney told them it was an honest gentleman, one Mr. Cotter, who lodged in his house, and they desired to be acquainted with him, and that he might be desired to come to them; and thereupon Pinkney sent his maid to let him know the gentlemen desired to be acquainted with him, to which Cotter sent word it was late, the next day was the Sabbath, and he desired to be private, and thereupon those persons told Pinkney they had heard he was a religious man, and used to perform family duties in which they desired to join with

him; at which Pinkney was very well pleased that he had got such religious persons, and so called to prayers, and while he was at his devotion they rose up and bound him and his servant, and then Cotter came to them and showed them where his money and plate lay, and they ransacked the house, and broke open several doors and cupboards fixed to the house; and upon this evidence, myself, my brother Wyld, Recorder, and Mr. Howell, Deputy Recorder, being all who were there present of the long robe, were of opinion that the entrance into the house being gained by fraud, with an intent to rob, and they making use of this entrance, thus fraudulently obtained, as in the night-time, to break open doors, &c. this was burglary, agreeably to the case of Farre, in this book, and the case of Mr. Le Mott, in this book, and accordingly they were found guilty, and had judgment, and were executed." *Cassy and Cotter's Case*, Kelyng, 62.

Farre's Case, to which Kelyng here refers, was, where the getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavit, without any color of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein. 2 East P. C. 485. "At the jail delivery in the Old Bailey, 5th of April 1665, my Lord C. J. Hyde, myself, and my brother Wyld, Recorder of London, then present, one Richard Farre and Eleanor Chadwick were indicted for breaking the house of Robert Stanyer, and putting his wife in fear, and stealing from thence several goods; and upon the evidence the case was, that Mrs. Stanyer, whose house was robbed, had for many years lived from her husband and hired the house, and a lease was drawn up for this house in her husband's name, which he refused to seal, and said he would have nothing to do with it, but the landlord and she agreed, and she constantly paid the rent, and had the house very well furnished, and had plate, jewels, and household stuff of a very great value. And Farre the prisoner, and Eleanor Chadwick, who lived with him as his paramour, and had so done a great while, intending to rifle her house, laid this design, namely, Farre went to an attorney of the Common Pleas, and told him that Mrs. Stanyer was his tenant, and in arrear for rent, and he had no way to get her out by ejectione firmæ, and thereupon he, according to the way now used, made a casual ejector of his own, and delivered a declaration, and Eleanor Chadwick made a false oath in the Common Pleas, that she had delivered a copy of that declaration to the tenant in possession, and thereupon judgment was obtained against the casual ejector, and a writ to the sheriff to deliver possession, and thereupon Farre got the sheriff's bailiffs to execute the writ and turn Mrs. Stanyer out of possession, and at the same time Farre took out a latitat against Mrs. Stanyer, supposing a debt, and at the same time arrested her, and would take no bail, but caused her to be carried to Newgate, and then Farre and Chadwick went to rifle their goods in the house, and broke open cupboards and trunks, and took away jewels and plate, and carried them into his own house and hid them there, and carried away divers of the goods by night, and took the pewter which had her husband's arms upon it, and got them taken out, and sold other of the goods; and after, upon complaint to my Lord Chief Justice, by his warrant, Farre's house was searched, and the jewels and plate there found, and divers other goods; and Farre and Chadwick, upon examination by my Lord Chief Justice, were sent by him to Newgate, and now this indictment preferred against them, and Farre being asked what color of

title he had to the house, could pretend none; but it appeared that the true landlord had received the rent of it for many years, and that no rent at all was behind. And Farre being asked what cause of action he had against Mrs. Stanyer to cause her to be arrested, could pretend none; and being likewise asked what color he had to break open *trunks and cupboards*, and to take the goods and sell them, and cause the coat of arms to be expunged, he could make no pretence, and it was agreed by us all that although they had made use of the law and officers of the law to get the possession and arrest the woman, yet if all this were done in *fraudem legis* with intent to rob, this course was so far from excusing the robbery, that it heightened the offence by abusing the law, and the process of it, without color of title, &c. as Coke, 3 Inst. 64: "If thieves, pretending to be robbed (as ante), raise hue and cry, and call a constable in the night, and cause him to search an house on pretence the thieves are there, and thereupon, by command of the constable, the door is opened and they go in, and then rob the house, this is burglary, though the house was not actually broken open by them, but opened at the command of the constable, for this being in *fraudem legis*, shall not be accounted an actual breaking in them;" and so was Le Mott's Case adjudged, which is in this book, the next case before this; and so it hath been adjudged, that if goods be distrained and put in a pound, and one who hath a design to steal them, go to the sheriff and get a replevin for these goods, and by color of this replication the goods are delivered to him, and he driveth them away, and sells them, having no color of title to them, this is felony. And we also agreed that although Mr. Stanyer, the husband, did not dwell in this house, and refused to have to do with it, yet the indictment was well, for breaking open *his dwelling-house*; for whatever the wife hath is the husband's in law, and it cannot be said to be the wife's house, and so direction was given to the jury that if they did believe that the prisoners had done all this with an intent to rob, they ought to find them guilty, and the jury did find them guilty, and both of them had judgment to be hanged, and they were executed accordingly." Farre's Case, Kelyng, 43, 44, 45.

I have given these two reports from Kelyng, says Wilmot, Law of Burglary, p. 41, verbatim, not only on account of their high authority — Lord C. J. Holt, who succeeded him as Chief Justice of England, having, together with Justices Powell, Powys, and Gould, set the seal of their approval upon the publication of his reports, Holt having himself been the editor of them, according to Foster C. J. 263 — but because in both cases mention is made of the parties having broken open cupboards, and yet Kelyng does not advert to this fact as in any way establishing the burglary. And yet Cassy and Cotter's Case is cited thus in the Index, under the head "Burglary." "So to break open a closet door or cupboard fixed to the freehold." Nevertheless, we find in another part of Kelyng's Reports, where he is speaking of its being necessary, in order to make a robbery of a house under the 23 Hen. VIII. ch. 1, and 5 Edw. VI. ch. 9, and to oust the offender of clergy, that there should be an actual breaking of the house, or such violence to some person therein, as shall put them in fear or dread, we find, I say, a passage by which it seems that he did incline to the opinion that the breaking of a cupboard fixed to the freehold might aggravate a larceny to robbery or burglary,

as the case might be. "Note," he says, "that in Popham's Reports, 84, in one Baynes's Case, it is said that the said Baynes, with another, coming in the night-time to a tavern to drink, the said Baynes stole a cup in which they drank, out of a chamber in the said house, his wife and servant being in the said house, for which he was indicted and found guilty. And it is there reported that by the opinion of Anderson, Popham, and Perrin, and the then Recorder and Sergeant of Law, these being present, it was agreed that this was no burglary, which certainly is good law, because there was no actual breaking of the house, which is of necessity to make a burglary." Then, after some remarks on the distinction between robbery and larceny, and the degree of fear caused, necessary to bring the offender within the statutes 23 Hen. VIII. ch. 1, and 5 Edw. VI. ch. 9, he goes on to say: "For if the door of a house be open, and a thief enter in the night and steal goods, this is only larceny and no burglary, because there was no force, which is that which distinguisheth robbery from larceny. Now this force which will make a robbery of a house within those statutes to take away clergy, may either be an actual breaking of a house, or an assault upon the person, and therefore if company come to drink in a tavern or other victualing-house, and being there they break open a door of another chamber or cupboard in the wall which is fixed to the freehold, and steal away goods, this is a robbery for which clergy is taken away by those statutes. But the breaking open of a trunk or box, and taking away things, is no robbery of a house within the statute, because those things which were broken were no part of the house."

The case of *Le Mott*, cited from Kelyng, had its weight in the decision of a subsequent case, where fraud was exercised to gain admission to the house, and it was held burglary. This was the case of *Ann Hawkins*, cited from the MS. of *Tracy*, in *East's Pleas of the Crown*. "At the Old Bailey sessions, before Easter term 1704, *Ann Hawkins* was indicted for burglary, and, upon evidence, it appeared that she was acquainted with the house, and knew the family were in the country. That meeting with the boy who kept the key, she desired him to go with her to the house, and, to induce him, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time, *Holt C. J.*, *Tracy*, and *Bury* adjudged it to be clearly burglary in the woman, for she prevailed with the boy, by fraud, to open the door with intent that she might rob the house; and *Lord Holt* relied upon *Le Mott's Case*." *Hawkins's Case*, 2 East P. C. 485.

In *The State v. Henry*, 9 Iredell, 463, it was held, that there cannot be a constructive breaking by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry be immediate, or in so short a time that there is no opportunity for the owner or his family to refasten the door. In that case, the owner was decoyed to a distance from his house, leaving his door unfastened, and it was not fastened by his family after his departure. At the expiration of ten or fifteen minutes, the prisoner entered the house, by opening the unfastened door, with intent to commit a felony. Held, that this was not burglary. But see the dissenting opinion of *Ruffin C. J.*

So to persuade an innocent agent, either under color of right or on any other excuse, or to incite a child under years of discretion, to open the door of another man's dwelling-house in the night-time, and thence bring out goods, would be burglary in him that should thus persuade, although he take no part himself in the transaction; but the agent or the child, by reason of its tender years, would stand excused. "If A." says Lord Hale, "being a man of full age, takes a child of seven or eight years old, well instructed by him in this villanous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to A. who carries them away, this is burglary in A. though the child that made the entry be not guilty, by reason of his infancy." 1 Hale P. C. 555.

"So if the wife, in the presence of the husband, by his threats or coercion, breaks and enters the house of B. in the night, this is burglary in the husband, though the wife, that is the immediate actor, is excused by the coercion of her husband." 1 Hale P. C. 556. Purcell Crim. Pl. 15. Broom Commentaries, 880. 3d ed. In Blackstone's Commentaries, IV. 29, the law is broadly laid down that the wife is guilty and punishable as if she were sole, if she commits those "crimes which, like murder, are mala in se, and prohibited by the law of nature." But "this position," says Mr. Greaves, "is obviously much too large, as it includes larceny and *burglary*." 1 Russell on Crimes, 34 note. 4th ed.

A breaking may also be effected by conspiring with persons within the house, by whose means those who are without effect an entrance. "If A. the servant of B. conspires with C. to let him in to rob B., and accordingly A. in the night-time, opens the door or window, and lets him in, this is burglary in C. but larceny in A. the servant, according to Dalton, ch. 151, p. 351. It seems it is burglary in both, for if it be burglary in C. it must needs be so in A. because he is present and aiding C. to commit this burglary. 1 Hale P. C. 553.<sup>1</sup>

The passage in Dalton, here cited by Hale, is the following: "If a servant conspiring with another to rob his master, shall open his master's door or window in the night, and the other entereth thereat, this is burglary in the stranger, by the opinion of Sir Roger Manwood, and the servant is but a thief, and no burglar." Dalton J. P. tit. Burglary.

Hawkins compares the case of a servant letting in a thief at night with that where many act in concert, and although some of the party keep watch at a distance, they are, by construction of law, equally guilty of breaking and entering the dwelling-house as those who actually break and enter. "It is certain that in some cases one may be guilty of burglary who never made an actual entry at all, as where divers come to commit a burglary together, and some stand to watch in adjacent places, and others enter and rob, &c. for in all such cases the act of one is, in judgment of law, the act of all. And upon the like ground it has been deliberately determined upon a special verdict, that a servant who, confederating with a rogue, lets him in to rob a house, &c. is guilty of burglary as much as the rogue himself; for it is clear that if the servant were out of the

<sup>1</sup> Crompton says it is burglary in the servant, but adds a quære. "Mon servant conspire avec laron de robber moy, et le servant over le huis al laron, que entre in le nute, d'emblear plate, ceo est burglarie in le servant. Quære." Fol. 22 b.



house, the entry of the other would be adjudged to be his also; and what difference is there when he is in the house?" 1 Hawkins P. C. ch. 17, §§ 13, 14. ed. Curwood.

East (2 P. C. 446) and Blackstone have adopted the reasoning of Hawkins. "If a servant," says the latter (4 Comm. 227) "conspires with a robber, and lets him into the house by night, this is burglary in both, for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt."

This was the ground upon which the Judges based their decision in Cornwall's Case, although the point raised at the trial, and which caused the doubt in the minds of the Judges who tried the case, was the fact that the servant did not go out with the prisoner after letting him out of the house. The case is reported in Strange. "Joshua Cornwall was indicted, with another person, for burglary, and upon the evidence it appeared that he was a servant in the house where the robbery was committed, and in the night-time opened the street door and let in the other prisoner, and showed him the sideboard from whence the other prisoner took the plate; then the defendant opened the door and let him out, but the defendant did not go out with him, but went to bed. Upon the trial it was doubted whether this was burglary in the servant, *he not going out with the other*; and it being laid down in Hale P. C. 81, Dalton, 317, that it is not burglary in the servant, the Judges ordered it to be found specially. And afterwards, at a meeting of all the Judges at Sergeants' Inn, they were all of opinion that it was burglary in both, and not to be distinguished from a case which had often been ruled and allowed in the same page in Hale, that if one watches at the street end while the other goes in, it is burglary in all; and upon report of this opinion the next sessions, the prisoner was executed." Cornwall's Case, 2 Strange, 881.

It was formerly considered doubtful how far it might be considered as a breaking, if a servant, acting in confidence, and with the assent of his master, let robbers in by agreement with them to steal, but in truth with a view to their apprehension. 2 East P. C. 486. This was the subject of much debate and doubt in Egginton's Case, 2 East P. C. 494; but as the points reserved in that case for the opinion of the Judges made no mention of this intentional co-operation of the servant with the robbers, and of his real design in opening the door, the current of opinion at that time must have been, that such admission of the prisoner, with intent to apprehend them, would not render it less a breaking of the house. A case, however, has been decided, by which the question has been otherwise settled. This was *Regina v. Johnson, Carrington & Marshman*, 218, where it was held by Maule J. and Rolfe B., that if a servant, pretending to agree with a robber, open the door and let him in, for the purpose of detecting and apprehending him, this was no burglary, for the door was lawfully open.

There may also be a breaking in law where, in consequence of violence commenced or threatened, in order to obtain an entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door, through which the robber enters. 2 East P. C. 486. 1 Hawkins P. C. ch. 17, § 7, ed. Curwood. Although Hawkins rather gives it as the opinion of others than his own. "According to some opinions," he says, "he would have been in

like manner guilty, if upon an assault made by him upon the house with intent to rob it, the owner had opened the door in order to drive him off, and thereupon he had entered; in which case, as some say, the opening of the door by the owner, being occasioned by the felonious attempt of the other, is as much imputable to him as if it had been actually done by his own hands." In a case, where the evidence was that the family within the house were forced by threats and intimidation to let in the offenders, Thompson B. told the jury that although the door was literally opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force which had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns; if under these circumstances the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations, to prevail upon them so to open it, as if they had actually burst the door open. *Rex v. Swallow*, MS. Bayley J., 2 Russell on Crimes, 9. 4th ed.

But if upon a bare assault upon a house, the owner fling out his money, it is no burglary, 1 Hawkins P. C. ch. 17, § 3; though, if the money were taken up in the owner's presence, it would be robbery. 2 East P. C. 486. Even if a hole were broken in the house by the violence of the assault, it would not be rendered burglary on that account. "A. intending to rob B. breaks a hole in his house, but enters not, B. for fear throws out his money to him, A. takes it and carries it away, this is certainly robbery, and some have held it burglary, though A. never entered the house; and so it is reported to have been adjudged by Saunders C. B. Crompton, 31 b. tamen quære." 1 Hale P. C. 555. Dalton is, however, of a contrary opinion. "If upon an attempt of burglary, they within the house shall cast out their money for fear, this is burglary." Dalton J. P. tit. Burglary. Sergeant Wilson says, in his note on the above passage in Hale: "It was adjudged by Montague C. J. and Saunders only related it." And Russell, in a note on this passage of Hale, says: "Certainly, as a part of the statement of the case is, that there was *no entry* into the house, and as an entry is as an essential a part of the offence as the breaking, it seems difficult to discover the ground on which it could have been ruled to be burglary." 2 Russell on Crimes, 9. 4th ed. But it may have been possible that the evidence in the case before Montague was, that, in breaking the hole in the wall, the offender introduced his hand or arm, to reach goods in the house, and thus there would have been a clear breaking and entering, independently of the act of the owner in throwing out his money to the thief. Lastly, all by construction of law are guilty of the breaking who are acting in concert with those who actually break and enter. "So it is if A. B. and C. come to commit a robbery, and A. stands sentinel at the hedge corner, to watch if any one come, and B. and C. commit the robbery, though A. was not actually present, nor within view, but at a distance from them, and the *like in burglary*." 1 Hale P. C. 534, 439. 3 Inst. 63.

<sup>1</sup> They must be near enough to render assistance. This seems adverse to what was laid down in *Rex v. Jordan*, 7 Carrington & Payne, 432, that those who are present at the breaking, but not at the entry, are guilty of burglary. In the latter case, can there possibly be any constructive presence so as to satisfy the requisitions of the law? See 1 Hale P. C. 555.

We will close this note on the breaking essential to burglary, with the words of Hale: "In all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it."<sup>1</sup> Hale Sum. 80.

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REX v. M'KEARNEY.<sup>2</sup>

May 20, 1829.

*Burglary — Breaking out of a Dwelling-House.*

The getting the head out through a skylight is sufficient breaking out of a house to constitute burglary.

THE prisoner was tried before M'CLELLAN B. at the spring assizes at Omagh in 1829, on an indictment for a burglary in the house of Louis Davis. There were three counts in the indictment: the first, for breaking and entering the house by night with intent to steal, &c.; the second, for entering the house with intent to steal, &c. and breaking said house by night, and getting out of the same; the third, for entering said house with intent to steal, &c. and by night breaking out of said house.

It appeared on the trial, that on the 8th of January 1829, the prisoner was, about 11 o'clock at night, discovered in the cellar of the house, hid under a heap of potatoes; he fled from the cellar into a room in the house and locked himself in; this room had a shed roof and a skylight in the roof. Davis, the owner of the house, heard the skylight breaking, and then ran round into his yard, when he saw the prisoner with his head out of the skylight

<sup>1</sup> In the above note, although it is said that if a person leave his window open it is no burglary to enter thereby, inasmuch as there is no breaking, yet a case might occur where a door or window might be left open, and yet a burglary take place. Suppose I sleep with my bedroom window open, and a thief is found at night breaking open the door of my premises, and within my dwelling-house, here all the windows of my house would not have been closed, but inasmuch as the presumption thereby raised in favor of the prisoner, that there had not been the breaking necessary to constitute burglary, would be overcome by the fact that he had been found actually breaking into the house, the requirement of the law, namely, that there should be both a breaking and entry, would be amply satisfied. But, in the absence of any positive proof of the breaking, the fact of the window having been left open would defeat the burglary.

<sup>2</sup> Jebb C. C. 99.

endeavoring to escape, — he struck the prisoner a blow on the head, when he fell down into the room, where he was taken by a police constable immediately after, on his breaking open the door which the prisoner had locked. The jury convicted the prisoner, but the learned Baron entertaining some doubts whether there was a sufficient breaking out of the house to constitute the crime of burglary, reserved the following question for the twelve Judges: Whether, the prisoner having only got his head out of the skylight, this was a sufficient breaking out of the house to complete the crime of burglary?

The Judges unanimously ruled that the conviction was right.

It was formerly doubted, if a thief entered a dwelling-house in the daytime, and lay there till night, and then robbed the house and went out, either by opening a door or window, or by such other act as the law holds to be a breaking, whether this were burglary. Again, if a person entered a dwelling-house in the night-time by an open door or window with intent to commit felony, and, in going out, also in the night-time, should open another door, or break out in any other manner, whether this were burglary. Lord Coke is totally silent on the subject, but we find the two following passages in Hale: "If a thief be lodged in an inn, and in the night he stealeth goods and goeth away, or if he enters into the house secretly in the daytime, and there stayeth till night, and then steals goods and goes away, this is not burglary. Dalton, 253. Crompton, 34, *a.*" 1 Hale P. C. 553. "If a man enters in the night-time, by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this, I think, is not burglary against the opinion of Dalton, p. 253, out of Sir Francis Bacon, for *fregit et exivit, non fregit et intravit.*" 1 Hale P. C. 554.

The passage in Dalton, here referred to by Hale, is as follows: "If a thief finds the door open, and cometh in by night, and robs the house, and be taken with the manner, and breaks a door to escape, this is burglary; yet the breaking of the door was without any felonious intent, but it is one entire act. Sir F. Bacon, Elem. 65. But if one cometh into my house in the daytime, and there hideth himself till night, and then robbeth me (*sc.* goeth out of my house, and taketh away some of my goods with him), yet this is no burglary, for that he broke not my house. For the first case, it was so holden at Derby Assizes, 32 Eliz.<sup>1</sup> Crompton, 34. Quære, he adds, of his opening the door to escape,

<sup>1</sup> On referring to Crompton, we certainly find a quære, but it does not appear to have any reference to the opening of a door by a thief in his escape. In the edition of his Justice, published in 1583, the following is the passage: "*Larons, entrent in mon meason in le nute per huis estant overt de committer felony et pur cêo que ils perceive que fuerunt ales al coucher, ils sen allount, et sur pursute fuerunt pris, n'est burglarie, ceo ils ne infrent meason.*" In this edition we have no quære, but in a latter edition, published A. D. 1606, we find the same paragraph thus concluded: "*Semble, que n'est burglarie car ils n'infrent le meason, quære?*" Crompton's Fitzherbert's Justice, fol. 34. Lambard, whose Eirenarcha, or Office of Justice of the Peace, was published A. D. 1619, and closely follows Crompton, makes no mention of burglary by breaking out of a dwelling-house.

if that shall not make it burglary." Dalton Just. ch. 251. It has been since settled, that it is not the less a burglary, if the person breaking out is lawfully in the house as a guest or lodger. *Regina v. Wheeldon*, 8 Carrington & Payne, 747.

Those doubts entertained by Hale were, however, set at rest by the statute 12 Anne, ch. 1, § 7, which, after reciting, "That there had been some doubt whether the entering the mansion-house without breaking the same, with an intent to commit some felony, and breaking the said house in the night-time to get out, were burglary," declared and enacted that, "If any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, or, being in such house, shall commit any felony, and shall in the night-time, break the said house to get out of the same, such person is and shall be adjudged and taken to be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if such person had broken and entered the said house in the night-time, with an intent to commit felony there." This act was passed in consequence of a special verdict found in the case of Elizabeth Clarke, tried at the Old Bailey 1707, where Lord Holt and C. J. Trevor had expressed a doubt upon the point, and the special verdict had been found at the direction of the former. 2 East P. C. 490. The statute of Anne was repealed by the 7 & 8 Geo. IV. ch. 27; and the 7 & 8 Geo. IV. ch. 29, § 11, declares that, "If any person shall enter the dwelling-house of another, with intent to commit felony, or being in such house, shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary."

Upon this statute it has been held to be not the less a burglary, if the person breaking out of the house, having committed a felony, was lawfully in the house, as a servant, lodger, or guest at an inn. "The prisoner was indicted for burglary in having broken out of the house of Aaron Collins. The prosecutor said, that on the night of the 31st of December, the prisoner lodged at his house. Before going to bed on that night, he had secured his house. Between three and four in the following morning, he heard the prisoner get up and leave the house. Mrs. Collins, the prosecutor's wife, proved that when she got up in the morning of the first of January, she missed a jacket, which was afterwards found in the possession of the prisoner, and she also proved that at between three and four in the morning, she heard the prisoner go down stairs, unbolt the back door of the house, and go away. Erskine J.: If a person commits a felony, and breaks out of the house in the night-time, that is burglary, although he might have lawfully been in the house. If a lodger has committed felony, and in the night-time even lifts a latch to get out of the house with the stolen property, it is a burglarious breaking out of the house. It is the purpose for which he undoes the fastening that makes the purpose unlawful. Verdict guilty." *Regina v. Wheeldon*, 8 Carrington & Payne, 747.

It seems from the above opinion of the learned judge, that the words "breaking out" in the statute would be satisfied, even if the attempt of the prisoner to get out<sup>1</sup> proved abortive, and he were arrested before any part of his body were

<sup>1</sup> Lifting a latch to get out, might have satisfied the words of the statute of 12 Anne, "shall break the said house to get out of the same;" but would the lifting a latch be "a breaking out," according to the words of the statute 7 & 8 Geo. IV. ch. 29, § 11.

outside the dwelling-house, sed quære. And the passage in Hawkins, which appears to support this dictum of Erskine J. is rather applicable to a constructive breaking and entry than to a breaking out of the house. "If one enter a house by a door which he finds open, or through a hole which was made there before, and steal goods, &c. or draw any thing out of a house through a door or window which was open before, or enter into a house by the doors open in the day-time, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary. But it is certain that he would have been guilty thereof if he had opened the window or unlocked the door, or broke a hole in the wall, and then had entered; or if having entered by a door which he found open, or having lain in the house by the master's consent, he had but unlatched a chamber door, or if he had come down by the chimney." Hawkins P. C. ch. 38, § 4. And we find a parallel passage in Hale, who is evidently speaking of burglary by breaking and entering into a dwelling-house. "If A. enters the house of B. in the night-time, the outward doors being open, or by an open window, and when he is within the house turns the key of a door<sup>1</sup> of a chamber, or unlatcheth a chamber door, with intent to steal, this is burglary, though the outward door were open; and so it was adjudged upon a special verdict before me at the sessions at Newgate, 1672, by advice of many Judges then also present." 1 Hale P. C. 555. Hale could not, in this passage, have been speaking of burglary by breaking out of a dwelling-house, for in the very next sentence but one (already quoted) he gives it as his opinion, contrary to that of Sir F. Bacon, that such breaking out was no burglary. And as breaking without entry is insufficient to constitute burglary at common law, it would almost seem, that a breaking without some sort of egress on the part of the person endeavoring to escape, would not satisfy the words of the statute "break out of the dwelling-house." But if a person having been lawfully in the house as a servant, lodger, or guest, attempt to commit felony, but is resisted, and breaks out of the house, he is not guilty of burglary under the statute 7 & 8 Geo. IV. ch. 29, § 11. He did not enter the house with intent to commit felony, nor has he actually committed it, therefore he comes under neither requisition of the statute. For example, as if a lodger or servant were to attempt to commit a rape upon the person of one of the female inmates of the house, and in consequence of resistance by the person assaulted, left the felony incomplete, and broke out of the house, in order to effect his escape, he would not be guilty of burglary.

In *Rex v. Lawrence*, 4 Carrington & Payne, 231, it was held, that the escaping out of a house by lifting up a covering kept down by its own weight, was not a breaking out of the dwelling-house under the statute. "At the Hereford Spring Assizes in 1830, the prisoners were indicted before Baron Bolland, for burglary. There were two counts in the indictment; the first, charging the prisoners with breaking into the dwelling-house of Henry Gatehouse, with intent to steal his

<sup>1</sup> A case, reported by Crompton, had gone still further. "Thief enters a house in Essex, at night, the door (huis) being open, upon which the wife of the owner, in fear, retires within her chamber, and shuts the door. The thief pushes against the chamber door to open it, the woman cries out, and assistance being given, the thief is taken. This was held burglary in Queen Elizabeth's time, "as," says Crompton, "I have heard." Crompton's Justice, fol. 26 b.

goods; the second count charged a breaking out of the house. There was no evidence to show how the prisoners got into the house, but the evidence of the breaking out was as follows: Mr. Gatehouse, the prosecutor, said: 'At about half-past ten o'clock on the night of the 6th of December, I secured my house, and went to bed. There is a trap-door over the cellar in the court-yard, which was down. This trap-door drops down into its place, but has no fastening of any kind, it is merely kept down by its own weight. This trap-door is a new one, and on the 6th of December the fastenings had not been put upon it. The old trap-door, for which this new one was substituted, had been secured by fastenings. I did not lose any of my property.' A watchman said: 'I was on duty on the night of the 6th of December; I saw the prisoner, Lawrence, push up the trap-door and come out of Mr. Gatehouse's cellar; I also heard the footsteps of a man in Mr. Gatehouse's hall; I heard a second man unlock the hall door, and open it, and then run out of the house. That man was the other prisoner.' *Powell*, for the prisoner, objected that the lifting up of the flap was not sufficient to constitute a breaking. *Davis*, contra, cited the case of *Rex v. Brown*, 2 East P. C. 487. Bolland B. I am of opinion, that the lifting up of this flap by the prisoner Lawrence is not a sufficient breaking. I think, therefore, that he must be acquitted. As to the other prisoner, I am decidedly of opinion, that the unlocking and opening of the hall door, and running away, are sufficient to constitute a breaking out of the house. The case is, therefore, made out as to him, if the jury are satisfied that he is the person who broke out of the house. The jury acquitted both the prisoners." *Rex v. Lawrence*, 4 Carrington & Payne, 231.

This case, however, appears to have been overruled by *Rex v. Russell*, 1 Moody C. C. 377, ante p. 44, unless, as Mr. Greaves justly remarks, in a note to his excellent edition of Russell on Crimes, vol. 2, p. 8 note, a breaking out of a house can be distinguished from breaking into one.<sup>1</sup>

<sup>1</sup> In the Fifth Report of the English Commissioners on Criminal Law, we find the following forcible remarks on burglary, by breaking out of a dwelling-house: "By the statute 12 of Queen Anne, ch. 1, § 7 (now repealed by 7 & 8 of Geo. IV. ch. 27, and re-enacted by ch. 29 of the same statute) the crime of burglary was extended to the case of an offender, who, having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterwards broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon any just principle. After a felony has been committed within the dwelling-house, the offence is not in reality aggravated by lifting the latch of the door, or the sash of a window, in the night-time, in order to enable the offender to escape. A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime; and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act, is made deeply essential to the crime. It is ineffectual, even with a view to the object proposed; the pretext for the conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance." Accordingly, the articles drawn up by the English Commissioners on Criminal Law, with reference to the crime of burglary, are totally silent as to the offence of larceny in a dwelling-house, in the night-time, becoming burglary, if the offender, after committing a larceny, or having entered the dwelling-house with intent to commit felony, should, either actually or constructively, break out of the house. In fact, the Commissioners, in the body of their report, expressly recommend the repeal of the 7 & 8 Geo. IV. ch. 29.

UNITED STATES v. WOOD.<sup>1</sup>

January Term 1840.

*Perjury — Corroborative Evidence — Defendant's Letters and Genuine Documents.*

On an indictment for perjury in taking the owners' oath under the act of March 1, 1823, section 4, (3 Statutes at Large, 730) it is not necessary for the prosecution to produce a living witness to testify to the falsehood of the fact sworn to; if the jury believe that the written evidence contained in the defendant's letters and in other documents recognized by him as genuine, proves he made a false and corrupt oath, he may be convicted.

THE case is stated in the opinion of the Court.

*Gilpin*, Attorney General for the United States.

*Maxwell*, contra.

Mr. Justice WAYNE delivered the opinion of the court. This cause has been sent to this court, upon a certificate of division of opinion between the Judges of the Circuit Court for the southern district of New York.

The defendant was indicted for perjury, in falsely taking and swearing to the "owners' oath, in cases where goods have been actually purchased;" as prescribed by the 4th section of the Supplementary Collection Law of the 1st March 1823. 3 Story's Laws, 1883.

The indictment charged the perjury to have been committed on 20th April 1837, at the custom-house in New York, on the importation of certain woollen goods, in the ship *Sheridan* from Liverpool, shipped to the defendant by John Wood of Saddleworth, England. There were two counts in the indictment. The first count charged the perjury in swearing to the truth of the entry of the goods, and averred that the actual cost of the goods was not truly stated in the entry; that it was known to the defendant that they cost more than was there stated, and that, on entering them, he intentionally suppressed the true cost, with intent to defraud the United States. The second count charged the perjury in swearing to the truth of the invoice produced by the defendant at the time of the entry; and contained similar averments as to its falsity and the intention of the defendant.

<sup>1</sup> 14 Peters, 430; 13 Curtis's Reports of Decisions in the Supreme Court of the United States, 576.



In the progress of the trial, it appeared in evidence that the goods in question had been shipped to the defendant by his father, John Wood of Saddleworth, England, in March 1837; and that, in the invoice produced by the defendant at the time of entry, and referred to in the oath, the goods in question were represented to have been bought by the defendant of said John Wood.

It also appeared, that for several years before, and for some time after, the importation by The Sheridan, the defendant had been in the habit of receiving woollen goods from his father, which were entered in the custom-house in the city of New York, upon the oath of the defendant, as owner, and upon the production of invoices representing the goods to have been sold to the defendant by the said John Wood.

It appeared from the testimony of the inspectors of the customs, that the packages designated for inspection, according to their examination and judgment, were not valued in the invoices beyond the actual value of similar goods imported by other persons.

No witnesses were produced on the part of the prosecution, to testify to the actual cost of the goods in question, at the time and place when and where they were purchased. But the counsel for the United States, to prove the charge in the indictment, to wit, that the goods in question actually cost, to the knowledge of the defendant, more than the prices stated in the invoice, offered and proved an invoice book of John Wood, and thirty-five original letters from the defendant, Samuel R. Wood, to the said John Wood, written between April 1834, and December 1837; and, it was alleged on the part of the prosecution, that this proof disclosed a combination between Samuel R. Wood and John Wood, to defraud the United States, by invoicing and entering goods, shipped at less than their actual cost; and also disclosed that this combination extended to the shipment by The Sheridan; and that the goods received by that vessel had cost, as defendant knew, when he entered the same, more than the prices stated in the invoice produced, and in the entry made by him.

The counsel for the defendant objected to the competency of such proof to convict of the crime stated in the indictment; and insisted that even if an inference of guilt could be derived from such proof, it was an inference from circumstances not sufficient, as the best legal testimony, to warrant a conviction.

That the legal testimony required to convict of perjury in this

case, was the testimony of at least one living witness to disprove the truth of the defendant's oath as to the actual cost of the goods, at the time and place of exportation.

That until such proof was adduced, the documentary evidence produced by the counsel of the United States did not constitute the legal evidence upon which the defendant could be convicted of the perjury, charged in the indictment.

The Judges were divided in opinion, "whether it was necessary, in order to convict the defendant of the crime charged in the indictment, to produce, on the part of the prosecution, at least one living witness, corroborated by another witness, or by circumstances, to contradict the oath of the defendant."

The rule upon which the defendant's counsel relies will be found in most of the elementary writers and digests of the law, very much in the same words. Blackstone in his Commentaries, vol. IV. p. 256, says: "The doctrine of evidence upon pleas of the crown, is in most respects the same as that upon civil actions. There are, however, a few leading points, wherein, by several statutes and resolutions, a difference is made between civil and criminal cases." Then, proceeding to state the differences made by some of the statutes in cases of treason, followed by a general remark or two, he observes: "But in almost every other accusation, one positive witness is sufficient;" and afterwards, contesting the general accuracy of Baron Montesquieu's reflection upon laws being fatal to liberty, which condemn a man to death in any case upon the deposition of a single witness, he adds: "In cases of indictment for perjury, this doctrine is better founded, and there our law adopts it, for one witness is not allowed to convict a man indicted for perjury, because then there is only one oath against another."

In Viner, vol. 16, p. 328, Perjury, K.: "Presumption is ever to be made in favor of innocence; and the oath of the party will have regard paid to it till disproved. Therefore, to convict a man of perjury, probable or credible evidence is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else it is only oath against oath. A mistake is not enough to convict a man of perjury; the oath must not only be false, but wilful and malicious. 10 Modern, 193."

In Hawkins's Pleas of the Crown, vol. 2, ch. 46, p. 91; vol. 2, p. 591, § 6, Curwood's ed., "On an indictment for perjury, the evidence of one witness is not sufficient, because

then there would only be one oath against another." Citing 10 Modern, 193, 'To convict a man of perjury, there must be strong and clear evidence, and more numerous than the evidence given for the defendant.' It does not appear to be laid down, that two witnesses are necessary to disprove the facts sworn to by the defendant; nor does that seem to be absolutely requisite. But at least one witness is not sufficient, and, in addition to his testimony, some other independent evidence ought to be adduced."

In Archbold's Criminal Pleading, 156, it is said: "Upon an indictment for perjury there must be two witnesses; one alone is not sufficient, because there is in that case only one oath against another. 10 Modern, 193. But if the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would perhaps be sufficient; although it does not appear as yet to have been so decided. *Rex v. Lee*, MS., 2 Russell on Crimes, 545. Also, if the perjury consist in the defendant having sworn contrary to what he had before sworn upon the same subject, this is not within the rule mentioned; for the effect of the defendant's oath in the one case is neutralized by his oath in the other; and proof by one witness will therefore make the evidence against the defendant preponderate." In 7 Dane's Abridgment, 82, citing Blackstone, it is said: "It has been decided, that one witness is not allowed to convict a man indicted for perjury, because there is only oath against oath." — "On a trial for perjury, the oath will be taken as true, until it can be disproved; and therefore the evidence must be strong, clear, and more numerous, on the part of the prosecution than that on the defendant's part; for the law will not permit a man to be convicted of perjury, unless there are two witnesses at least." For which is cited 1 Brown Ch. Rep. 419; Crown C. C. 625, 626.

In the third volume of Starkie's Law of Evidence, p. 1144, it is said: "It is a general rule, that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another. Nevertheless, it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the united testimony of many." In Vol. I. 399, the same writer

says: "So in the case of perjury, two witnesses are essential; for otherwise there would be nothing more than the oath of one man against that of another, upon which the jury could not safely convict."

In 2 Russell on Crimes and Misdemeanors, 648, 7th Amer. ed., it is said: "The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury, as in such case there would be only one oath against another. 10 Modern, 193." But Russell gives several exceptions to the application of the rule, resting upon principles clearly covering the conclusion to which the court has come upon the question before it.

In Phillipp's Evidence, the rule is also given as it is laid down in other writers; and the case in 10 Modern, 193, is referred to. It may be found, too, repeated in many of the volumes of the English and American Reports, as well as in the case of *The State v. Hayward*, 1 Nott & M'Cord, 546, cited by the defendant's counsel. The cases collected in 13 Petersdorff's Ab. Perjury, E. affirm the same rule. It must be conceded, no case has yet occurred in our own or in the English courts where a conviction for perjury has been had without a witness speaking to the corpus delicti of the defendant, except in a case of contradictory oaths by the same person. But it is exactly in the principle of the exception, which is by every one admitted to be sound law, that this court has found its way to the conclusion that cases may occur when the evidence comes so directly from the defendant that the perjury may be proved without the aid of a living witness.

These citations have been made with the view of placing the position contended for by the defendant's counsel in its most positive form, and to show that the conclusion to which the court has come has not been without a due consideration of the rule.

It is said to be an inflexible rule of the common law, applicable to every charge of perjury, that it cannot be changed but by the legislative power; that until some statutory change is made, courts must enforce it; that though other kind of evidence, and that relied upon by the prosecution in this case, may establish a case of false swearing, it will not suffice to convict for perjury; in short, that a living witness is in every case indispensable.

We do not think any change in the rule necessary. The question is, when and how the rule is to be applied, that it may not, from a technical interpretation, or positive undeviating adherence

to words, exclude all other testimony as strong and conclusive as that which the rule requires. It is a right rule founded upon that principle of natural justice which will not permit one of two persons, both speaking under the sanction of an oath, and presumptively entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow.

But in what cases is the rule to be applied? To all, where, to prove the perjury assigned, oral testimony is exclusively relied upon? Then oath against oath proves nothing, except that one of the parties has sworn falsely as to the fact to which they have sworn differently. There must then be two witnesses, or one witness corroborated by circumstances proved by independent testimony. If we will but recognize the principle upon which circumstances in the case of one witness are allowed to have any weight, that principle will carry us out to the conclusion, that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life.

That principle is, that circumstances necessarily make up a part of the proofs of human transactions; that such as have been reduced to writing, in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence aliunde; and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony.

If it be true, then, and it is so, that the rule of a single witness, being insufficient to prove perjury, rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms, the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another; satisfy the equal claim to belief, or remove the apprehension by concurring written proofs, which existed, and are proved to have been in the knowledge of the person charged with the perjury when it was committed, especially if such written proofs came from himself, and are facts which he must have known, because they were his own acts; and the reason for the rule ceases. It can only then be an arbitrary and peremptory rule, as Starkie says it is, when it is applied to cases in which oral testimony is exclusively relied upon to prove perjury.

And such we will perceive to have been the apprehension of this rule ; and if we will scrutinize its chronology, we cannot fail to see how truth has grown as cases have occurred for its application.

At first, two witnesses were required to convict in a case of perjury, both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition, the larger number of witnesses on one side or the other prevailed. Then, a single witness, corroborated by other witnesses, swearing to circumstances bearing directly upon the imputed corpus delicti of a defendant, was deemed sufficient. Next, as in the case of *Rex v. Knill*, 5 Barnewall & Alderson 929 note, with a long interval between it and the preceding, a witness who gave proof only of the contradictory oaths of the defendant on two occasions, one being an examination before the House of Lords, and the other an examination before the House of Commons, was held to be sufficient. Though this principle has been acted on as early as 1764, by Justice Yates, as may be seen in the note to the case of *The King v. Harris*, 5 Barnewall & Alderson, 937, and was acquiesced in by Lord Mansfield, and Justices Wilmot and Aston, we are aware that in a note to *Rex v. Mayhew*, 6 Carrington & Payne, 315, a doubt is implied concerning the case decided by Justice Yates ; but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards, before Justice Chambre, as will appear by the note in 5 Barnewall & Alderson, 937. Afterwards, a single witness, with the defendant's bill of costs (not sworn to) in lieu of a second witness, delivered by the defendant to the prosecutor, was held sufficient to contradict his oath ; and in that case Lord Denman says : "A letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." 6 Carrington & Payne, 315. All of the foregoing modifications of the rule will be found in 2 Russell, 648, 7th Amer. ed., and that respecting written documents is stated in Archbold, 157, in anticipation of the case in 6 Carrington & Payne, 315.

We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule.

In what cases, then, will the rule not apply ? Or in what cases may a living witness to the corpus delicti of a defendant be dispensed with, and documentary or written testimony be relied

upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it.

Let us suppose a case or two, in illustration of the positions just laid down.

A defendant, in two answers to a bill in equity, swears unequivocally to a fact, and as positively against it. A document is produced, executed by himself, decisive of the truth of the fact. In such a case, can a living witness be wanted; or could any number of living witnesses prove more certainly the false swearing, than it would be proved by the document and the defendant's contradictory oaths? Or, take the case of defendant being sued in equity, to recover from him the contents of a lost bond. In answer to a call upon him to say whether he had or had not made such a bond, he swears that he never had made such a bond. The bond is afterwards found and proved; is not his answer, then, upon oath, disproved by a circumstance, stronger than words can be, coming from the mouth of man?

Again, suppose a person, in order to obtain a right under a statute, is required to take an oath to a fact which is the mutual act of himself and another, and which from its nature is unequivocal. He swears contrary to the fact. Subsequently, his letters, written before and after his oath, are found; which disclose not only the real fact, but a general design to misrepresent facts of the same kind, and a book or other written paper is produced, bearing directly upon the fact, from its being the original of the transaction reduced to writing contemporaneously with its occurrence, and recognized by the defendant to be such, though it is in the handwriting of another; will not the defendant's recognition of it, with the auxiliary evidence of the letters, without a living

witness to speak directly to the corpus delicti of the defendant, justify the whole being put before a jury, in a case of perjury, for them to decide whether the defendant has sworn falsely and corruptly? In such a case, if the person was called, in whose handwriting the book or other written paper was, it might happen that he had only been the recorder of the transaction at the instigation of one of the parties to it, without his ever having had any communication with the other respecting its contents. The witness then would only prove so much, without proving any thing which bore upon the charge of false swearing. But when the defendant himself has recognized the book or writing as evidence of his act, and such recognition is proved, there is no rule of evidence which requires other proof, beyond his admission, to prove the contents of the book or paper to be true. But suppose the book or written paper to be also in the handwriting of the defendant, and that several of his letters confirm the fact that he has sworn contrary to the contents of the first, as all the evidence comes from himself, we cannot doubt it would be right to place the whole before a jury, for it to judge what was the truth of the fact, and whether the defendant had sworn falsely and corruptly.

We will now proceed to examine the case before us, to see if it fall within the principles and illustrations we have given.

The defendant is indicted under the Act of Congress of 1st March 1823 (3 Story, 1883) for falsely and corruptly taking the owners' oath in cases where goods have been actually purchased. It must be kept in mind, that this oath can only be taken in cases of goods imported from foreign countries. It places the importer, then, in a condition to commit fraud in the misrepresentation of the price he has given for the goods, with only an accidental possibility on the part of the United States ever being able to detect it by the evidence of the person from whom the importer has made the purchase.

The importer is required to swear that the invoice produced by him, contains a just and faithful account of the actual cost of the goods; and that he has not in the invoice concealed or suppressed any thing whereby the United States may be defrauded of any part of the duties lawfully due on the goods, &c. The oath does not require from the owner the value of the goods, but the cost to him. There is nothing in it relating to the quality of the goods, but simply the cost or price paid by the importer, as owner. The



defendant, in his entry, did it upon an invoice sworn to by him, to contain a just and faithful account of the actual cost ; that there was nothing in it concealed or suppressed.

He is charged with having sworn falsely in respect to the cost of the goods contained in the invoice, by which he made his entry of them. To maintain the charge, the United States must prove that he paid a larger price. The best evidence, it is admitted, must be introduced to establish that fact. What is the best evidence in respect to its quality, as distinguished from quantity or measure ; it being in the former sense that the best evidence is required ? It is, that secondary or inferior evidence shall not be substituted for evidence of a higher nature, which the case admits of. The reason of the rule is, that an attempt to substitute the inferior for the higher, implies that the higher would give a different aspect to the case of the party introducing the lesser. 1 Russell, 437. "The ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, to make a right application of it ; and if it shall be seen that the fact to be proved is an act of the defendant, which, from its nature, can be concealed from all others except him whose co-operation was necessary before the act could be complete, then the admissions and declarations by the defendant, either in writing or to others, in relation to the act, become evidence. It is no longer a question of the quality, but of the quantity of evidence, when it is said, as it is in this case, that his associate in the transaction should be introduced. For instance, we will suppose that the letters of the defendant in this case speak of the cost of the goods in the invoice, to which the defendant swore, and that they show the goods did cost more than they are rated at in the invoice ; the quality of the evidence is of that character that it cannot be inferred that superior evidence exists to make that fact uncertain. Unless such inference can be made, the evidence offered is the best evidence which the nature of the case admits. The evidence is good under the general principle that a man's own acts, conduct, and declarations where voluntary, are always admissible in evidence against him.

So in respect to the invoice book of John Wood, containing an invoice of the goods enumerated in the invoice, to which the defendant swore the owners' oath ; in the first of which the goods are priced higher in the sale of them to the defendant. If the

letters show the book to have been recognized by the defendant as containing the true invoice, his admission supersedes the necessity of other proof to establish the real price given by him for the goods ; and the letters and invoice book, in connection, preponderate against the oath taken by the defendant, making a living witness to the corpus delicti, charged in the indictment, unnecessary. All has been done in the case that can be done to intercept such evidence as would tend to prejudice or mislead ; and the case must then be confided to the good sense and integrity of the jury to determine upon the sufficiency of the evidence to convict ; the court charging the jury that the evidence offered is of that character which supersedes the necessity of introducing a living witness to prove the perjury charged in the indictment.

Let it then be certified to the court below, as the opinion of this court, that, in order to convict the defendant of the crime charged in the indictment, it is not necessary, on the part of the prosecution, to produce a living witness, if the jury shall believe the evidence from the written testimony sufficient to establish the charge that the defendant made a false and corrupt oath as to the cost of the goods imported in *The Sheridan*, enumerated in the invoice, upon which the defendant made an entry, by taking the owners' oath at the custom-house.

Mr. Justice THOMPSON dissenting. The question certified in the record is, whether it was necessary, in order to convict the defendant of perjury, to produce, on the part of the prosecution, at least one living witness, corroborated by another witness, or by circumstances, to contradict the oath of the defendant.

The rule, as we find it laid down in the elementary books on this subject, is, that to convict a party of the crime of perjury, two witnesses are necessary to contradict him as to the fact upon which the perjury is assigned ; and the reason assigned for the rule is, that if one witness only is produced, there will only be one oath against another. This rule, however, in the early adjudged cases, was so modified as to require but one living witness, corroborated by circumstances, to contradict the oath of the defendant ; and with this modification the rule has remained until the present day.

In the present case, the fact on which the perjury was assigned, related to the actual cost of the goods, at the time and place of exportation. This was a simple question of fact, susceptible of

proof by witnesses, like any other matter of fact. There was nothing, therefore, growing out of the nature of the inquiry, that rendered the proof by witnesses impossible, so as to take the case out of the rules of evidence, in relation to the crime of perjury. No living witness was produced to contradict the oath of the defendant at the custom-house, as to the original cost of the goods. His letters and certain invoice books were produced to sustain the indictment; and these might have been sufficient to warrant the jury in convicting the defendant, if such evidence is sufficient to convict a party of the crime of perjury, without the production of at least one living witness. It is, as has been already mentioned, laid down in the books as a technical rule in perjury, that there must be at least one witness and corroborating circumstances to convict of this crime; that there must be oath against oath, as to the *corpus delicti*.

When the books speak of a witness, they always mean oral testimony. It would hardly be considered as correct legal language, to call a letter of the defendant a witness against him. It was evidence, but not evidence by a witness. The rule, as originally laid down in the elementary treatises on evidence, requiring two witnesses to contradict the party on the matter assigned as perjury, was so modified or relaxed as not to require two witnesses to disprove the facts sworn to by the defendant. But if any material circumstances are proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. And in England one case occurred, as reported in a note in the fifth volume of *Barnewall & Alderson*, 929 note, where the evidence consisted of the contradictory oaths of the party accused, upon the same matter of fact in which the perjury was assigned. It was held, that in such case there was oath against oath, and the perjury might be assigned upon either; and that it might be left to the jury to judge of the motive. The authority of this case, however, has been very much doubted. But the present case does not come within that rule, even if we are disposed to follow the English courts on that subject; for the letters of the defendant cannot certainly be said to be evidence under oath, so as to charge him with contradictory oaths on the fact assigned as perjury. Rules of evidence are rules of law, applicable to the rights of persons as well as to the rights of property; and parties are entitled to have their rights tested

and decided by such rules, as much in one case as the other. This rule, however, in perjury, being a technical rule, may in many cases be difficult, if not impracticable, to be carried into execution. If it falls within the proper province of the court entirely to dispense with the rule, and put the evidence in perjury upon the same footing as other criminal offences, I should not be disposed to dissent from it; if, as a new rule, it was made to operate prospectively. But if it is intended to affirm the doctrine urged at the bar, that no such rule of evidence ever existed, as to require in the case of perjury at least one living witness, and circumstances in corroboration of his oath, in contradiction to the party charged upon the matter assigned as the perjury, it would, in my judgment, be at variance with a rule universally laid down in all the elementary treatises on the subject of evidence; and as yet never dispensed with, or ever called in question in any adjudication that has fallen under my notice. And that this rule still exists in the English courts, is shown by the late case of *Rex v. Mayhew*, 6 Carrington & Payne, 315, decided in the year 1834. The perjury in that case was alleged to have been committed by the defendant (who was an attorney) in an affidavit made by him to oppose a motion made in the Court of Chancery, on behalf of the prosecutor, to refer the defendant's bill of costs for taxation. To prove the perjury, one witness was called; and in lieu of a second witness, it was proposed to put in the defendant's bill of costs, delivered by him to the prosecutor. It was objected that this was not sufficient, as the bill had not been delivered by the defendant on oath. But Lord Denman C. J. said: "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness."

There was no intimation here, that a letter, or any number of letters, from the defendant, contradicting his statement under oath, would dispense with the technical rule in perjury, requiring at least one witness, and corroborating circumstances. The question was, as to what circumstances or evidence would dispense with a second witness.

In the present case, it may be difficult and perhaps impracticable to procure any living witness to contradict the oath of the defendant. But it is more congenial with the humane principles of our criminal law, that a guilty man should escape, than to convict him

upon evidence heretofore considered as insufficient, according to what is admitted to have been the settled rule of law. Answering the question put in the record in the negative, is abolishing that rule, and introducing one entirely new; and putting the crime of perjury on the same footing as any other criminal offence, with respect to the evidence necessary to convict the accused. If there are any great public considerations calling for such an innovation upon the rule of evidence in cases like the present, let it be altered by the proper tribunal, and under the general rules of evidence applicable to other criminal cases. The evidence derived from the letters of the defendant, is perhaps the best evidence the nature of the case will admit of. But it is an entire misapplication of this general rule to the present case, if there is a special and technical rule in the case of perjury, that there must be at least one living witness, and corroborating circumstances, to convict of that crime. I do not feel myself authorized to dispense with what I understand to be admitted, the heretofore settled rule of evidence, which I consider a rule of law, in the case of perjury; and to apply this new rule to the present case, by giving it a retrospective operation.

I am accordingly of opinion that the question put in the record ought to be answered in the affirmative.

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REGINA v. HOOK.<sup>1</sup>

May 1, 1858.

*Perjury — Corroborative Evidence — Admissions by Defendant.*

The prisoner was convicted of perjury. The prisoner, who was a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore on the hearing that he knew nothing of the matter except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. The perjury was assigned on this last allegation, and the evidence to prove its falsehood was as follows: The magistrate's clerk proved that the prisoner when laying the information said that he had seen four men leave the house after eleven, and that he could swear to one as W. It was also proved that on two other occasions the prisoner made a similar statement to two other witnesses; that W. and others did in fact leave the house after eleven o'clock on the night

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<sup>1</sup> Dearsly & Bell C. C. 606; 8 Cox C. C. 5.

in question; that on the hearing the prisoner acknowledged that he had offered to smash the case for 30s.; that he had talked in the presence of another witness of making the publican give him money to settle it; that he had in fact offered to the publican to settle it for 1l.; and had said that he had received 10s. to smash the case and was to have 10s. more.

*Held*, that the evidence was sufficient to prove the perjury assigned, and that the conviction was right.

THE following case was reserved and stated by Bramwell B.

The prisoner was convicted of perjury before me at the last assizes at Chester. He was a policeman, and laid an information against a publican for keeping open his house after lawful hours on the Fast Day. When called as a witness, on the hearing of the information, he swore he knew nothing of the matter, except what he had been told by another person, and that "*he did not see any person leave the defendant's house after eleven*" on the night in question. Perjury was assigned on this last allegation. It was material to show it was false; the following evidence was given. The clerk to the magistrates, who took the information, proved that the prisoner, on laying it, said he had caught the publican; he (the prisoner) had last night seen four men leave his house after eleven; that one of them he could swear to; it was Williamson; he knew him by his coat. It was further proved, by another witness, that the prisoner, on another occasion, made the same statement to him, the witness, viz. that he had seen four persons leave the house after eleven that night; to one of whom he could swear; it was Williamson; he knew him by his coat. It was further proved, by a third witness named Williamson; that on a third occasion, the defendant repeated this statement, with the variation "one I can swear to; it was your brother; I know him by his coat." It was proved that Williamson and others did leave the house on that night in question, after eleven. It was proved also that, at the hearing of the information, the defendant acknowledged that he had offered to smash the case for 30s. It was proved, by another witness, that when he, the defendant, talked of laying the information, he said he should make the publican give him money to settle it; a third witness proved that he heard the defendant offer to the publican to settle it for 1l., saying he was risking perjury; and a fourth proved that the defendant owned he had received 10s. to smash the case, and was to have 10s. more. It was objected there was no evidence to go to the jury; that the

only witness against the prisoner was himself; and that there was no evidence to show his unsworn statements were not false. The prisoner was convicted, and sentenced to one year's imprisonment and hard labor; but, doubts having been expressed on the case, I have to request the opinion of the Court of Criminal Appeal thereon.

G. BRAMWELL.

This case was argued on the 24th April 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

*H. Lloyd* appeared for the Crown, and *M'Intyre* for the prisoner.

*M'Intyre*, for the prisoner. It is clearly established that to support a conviction for perjury the falsity of the oath must be proved directly by two witnesses at least; or there must be one witness and strong corroborative evidence to confirm him. The rule, that one witness is not sufficient because there would be only one oath against another, is laid down in *Regina v. Muscot*, 10 Modern, 193, in which Parker C. J. said: "To convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath." This rule has been confirmed and acted upon in subsequent cases; and, although it has been held that one witness and corroborative evidence will do, *Coleridge J.* in *Champney's Case*, 2 Lewin C. C. 258, said: "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed Lord Tenterden C. J. was of opinion that two witnesses were *necessary* to a conviction." The same learned judge, speaking of this rule in *Regina v. Yates, Carrington & Marshman*, 132, said: "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only is not sufficient to warrant a conviction." The rule of law as to this is the same in Scotland as in this country. In *Alison's Criminal Law of Scotland*, 481, it is said: "A party cannot be convicted of perjury upon the evidence merely of persons or subsequent declarations emitted by him inconsistent with what he has sworn; because in *dubio* it must be presumed that what was said under the sanction of an oath was the truth, and the other an error or falsehood."

The perjury assigned in this case is that the prisoner falsely swore "that he did not see any person leave the defendant's house after eleven:" but, although it was proved that persons did leave the house after eleven, there is no evidence beyond the prisoner's own statement, when he was not upon his oath, that he saw any person leave, or that the statement he made when upon oath was false. Not only is there no oath that he did see, but none that he was there and could have seen. Here, there is the prisoner's statement not upon oath against his statement on oath; and in *Rex v. Harris*, 5 Barnewall & Alderson, 926, an indictment for perjury was held bad which only alleged that the prisoner had given evidence in the House of Lords directly contrary to that which he had given before the House of Commons. The prisoner's evidence on the hearing really amounts to this, that he knew nothing beyond what was told him by some other person, and the facts proved against him are consistent with his evidence on oath being true, and his statements not on oath being false.

*H. Lloyd*, for the Crown. In *Regina v. Wheatland*, 8 Carrington & Payne, 238, it was held that, where a prisoner has, previously to the oath on which perjury is assigned, sworn the contrary on the same matter, proof of the previous oath and other confirmatory evidence of its truth is sufficient to convict. Here the prisoner's statements, not upon oath, were equivalent to one witness, and it is shown by ample evidence that the statement made by the prisoner, when upon his oath, was false, and that his previous statements not upon oath were true. There is in fact an admission, abundantly proved, and that brings this case within the ruling in *Regina v. Wheatland*. In *Rex v. Mayhew*, 6 Carrington & Payne, 315, it was held that to prove perjury it is sufficient, if the matter alleged to be falsely sworn be disproved by one witness, if, in addition to the evidence of that witness, there be proof of an account or a letter written by the defendant contradicting his statement on oath.

*M'Intyre*, in reply. The decision in *Rex v. Mayhew* does not affect this case, because here there is no witness who proves the falsehood of the defendant in the allegation on which perjury is assigned. There is no evidence to show that the defendant did in fact see, or even that he had the opportunity of seeing, the persons come out of the house.

*Cur. adv. vult.*

The judgment of the court was delivered on 1st May 1858.

POLLOCK C. B. We are all of opinion that this conviction is



right. The prisoner swore to a fact, and it was proved by more than one witness that on other occasions he had made statements, not upon oath, inconsistent with the truth of his statement upon oath on which perjury was assigned. It was said in the argument against the conviction that a man could not be convicted of perjury merely by opposing his oath at one time to his oath at another time; and probably a conviction obtained in that way would not be considered right, unless there were also evidence by which the truth of the two statements might be distinguished — evidence to show that one was true and the other false; but there certainly is a direct authority that such a conviction would be good. In *Rex v. Harris*, 5 Barnewall & Alderson, 926, the defendant was charged with perjury upon a count in which his evidence upon oath before a committee of the House of Commons, and his contradictory evidence before the House of Lords was set out, and the indictment proceeded to say: “and so the jurors aforesaid do say that the said E. H. did commit wilful and corrupt perjury;” but there was no averment as to which of these two statements upon oath was false; and the Court of Queen’s Bench held that the count was bad in arrest of judgment. That indictment was, I believe, drawn by my brother Crompton from an old precedent; but the court said it would not do, because it was not sufficient to charge that on one occasion or the other the defendant committed perjury, but you must allege, and the jury must find, on which occasion he did commit it; and that if such a count was held good a person would be twice in peril of the pains of perjury on the same subject-matter. I believe that it was in a recent case held that in an indictment for murder it was not sufficient to allege that the death was caused *either* by burning *or* stabbing the deceased, although it might be quite clear that the death was caused in the one way or the other. I remember discussing that case with Parke B., now Lord Wensleydale, and he was of opinion that if one count alleged the death to be by stabbing and another by burning, and six jurymen believed that the death occurred as alleged in one count, and the rest that it occurred as alleged in the other, the accused must escape. So in an indictment for perjury, where one oath of the prisoner is opposed to another, it must be stated, and the jury must find, which is the false oath; and all that *Rex v. Harris* decides is that the charge cannot be alleged in an alternative way; but in *Rex v. Knill*,<sup>1</sup> arising out of the same transaction, the prisoner was convicted

<sup>1</sup> In note to *Rex v. Harris*, 5 Barnewall & Alderson, 929.

upon counts charging the perjury specifically to have been before the House of Lords, the only evidence being the proof of the two contradictory oaths, and the court held the evidence sufficient, and refused an application by Mr. Jones (afterwards Sergeant Atcherly) for a new trial. There is a note in the same case of a precedent, and some observations of Chambre J. in his Precedent Book,<sup>1</sup> which favors the view that, where the perjury assigned is upon one of two oaths, proof of the other oath will be sufficient; and it is there stated that a conviction upon this principle took place at the Lancaster Summer Assizes in 1764, in a case tried before Yates J. In that case a man had made an information on oath before a justice, that three women were concerned in a riot at his mill, and afterwards at the sessions he was examined concerning these women, (and having been tampered with in their favor) he then swore that they were not in the riot. There was no evidence on the trial to prove that the women were in fact in the riot (the perjury being assigned on the defendant's oath that they were not); but the defendant's own information on oath being produced and read, whereby he had sworn that they were in the riot, the judge thought it sufficient to convict him, and he was convicted and transported. After the trial Lord Mansfield C. J. and Wilmot and Aston JJ., to whom Yates J. stated the reasons of his judgment, concurred in his opinion. Then there is the case of *Regina v. Wheatland*, 8 Carrington & Payne, 238, in which this doctrine has been a little varied.<sup>2</sup> There, it being proposed to prove an indictment for perjury assigned on the evidence of the prisoner, on a trial at the quarter sessions, merely by the deposition of the prisoner before the committing magistrate, Gurney B. directed the jury that proof of the defendant having given contradictory evidence on two different occasions was not sufficient, and that they must see whether there was such confirmatory evidence of the defendant's deposition before the magistrate as proved that the evidence given by the defendant at the quarter sessions was false. In the present case it was proved by three witnesses that the prisoner had made statements to them contradictory of what he swore at the hearing, and I own I can take no distinction between statements made by the defendant upon oath and statements made by him seriously and on several occasions not upon oath. Then, in addi-

<sup>1</sup> *Rex v. Harris*, 5 Barnewall & Alderson, 937-940.

<sup>2</sup> See *Regina v. Gaynor*, Jebb C. C. 262.

tion to the statements of the defendant himself, there are strong confirmatory circumstances. The defendant offering to smash the case for one pound ; his admitting that he had received ten shillings and was to have ten shillings more ; and his talking of making the publican pay to settle it, are strong evidence to show that what he stated upon his oath was false, and that his statements not upon oath were true. For these reasons (for which I am responsible) I think the conviction was right, even assuming that *Rex v. Knill* could not now be safely acted upon, though that conviction was supported by the Queen's Bench as constituted in the time of Lord Tenterden, and was also supported, according to the authority of *Chambre J.*, by the Court of Queen's Bench in the time of Lord Mansfield. Probably no judge would now direct a conviction upon such evidence as was deemed sufficient in *Rex v. Knill* without confirmatory circumstances ; but in this case the conviction is supported by the confirmatory evidence of several witnesses, and it must be affirmed.

WIGHTMAN J. In order to convict a defendant of perjury it is necessary that there should be two witnesses, for this obvious reason, that if there is but one oath against another oath it is altogether in doubt which is true, and therefore two witnesses are required to contradict the oath on which perjury is assigned. But it is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is, that the defendant himself is proved to have made statements directly contrary to his statement upon oath ; that alone would not do : but in addition to that you have the oaths of other witnesses which go to show that that which he stated when not upon oath was true, and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the defendant ; as, one witness who could prove, as in this case, that on other occasions the defendant had stated that which was diametrically opposed to that which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions ; you have the contradiction of the defendant himself as deposed to on oath by one witness, and you have the contradiction of another independent witness who speaks to the falsehood

of the fact—you therefore have two independent contradictions on oath. It therefore seems to me that there was sufficient evidence, and I am of opinion that the conviction is right.

WILLES J. I am of the same opinion.

BRAMWELL B. The question in the case is, whether any matter be sufficiently proved which, if proved, would be enough to convict the prisoner of perjury. Now the matter proved was his own statement over and over again, which if true showed that what he swore was false. Well, were those statements not upon oath true, or was his statement upon oath true? The answer to that is, there is abundant evidence by which you can tell, because there is plenty of evidence to induce you to give a preference to the unsworn statement over the sworn one. Well then the matter which, if true, though contradicted, is enough to convict, is sufficiently proved by other circumstances, and that is sufficient to support the conviction. As I said before, if there be two opposing oaths only you could not properly convict a man of perjury, because the only legitimate conclusion to be drawn is that one was false. But when the oath complained of is sufficiently established, and you have other evidence to show that the oath not complained of was true, then it follows that the oath complained of was a false one. Whether in the case of two contradictory oaths the truth of the oath not complained of would have to be proved by two witnesses, I do not undertake to say at the present moment. The case of *Rex v. Knill* goes to show that it would not. Here you have a witness to prove that the defendant stated that he had seen a man come out of the house, and that proves that which, if true, goes to show that the defendant was guilty of perjury. Then, that that *was* true is proved by other witnesses, so that the matter is not left in doubt. I think therefore the conviction was right.

BYLES J. The rule of law requiring two witnesses to prove an assignment of perjury reposes on two reasons: first, that it would often be dangerous and always unsatisfactory to convict the defendant when there is but the oath of one man against the oath of another; secondly, that in all judicial proceedings all witnesses, even the most honest, would be constantly exposed to the peril, annoyance, and oppression of indictments for perjury if the single oath of another man, without any confirmatory evidence, might in point of law suffice to convict.

But the letter and spirit of the rule, and both the reasons for it, appear to me to be satisfied where, of two distinct admissions of the defendant inconsistent with his innocence, one is proved by one witness and one by another.

It has been already held that the testimony of one witness deposing to the defendant's admission on oath, if there is corroboration, is enough: *Regina v. Wheatland*, 8 Carrington & Payne, 238. But if a single witness deposing to an admission of the defendant be one witness within the rule, then another witness deposing to another admission, must surely be a second witness within the same rule.

Indeed, where the reasons for the rule requiring two witnesses in perjury do not exist, the rule itself no longer holds; and therefore the Court of Queen's Bench, in *Rex v. Knill*, have gone so far as to decide that, where the only evidence of the defendant's guilt is his own admission on oath (perjury being properly assigned in the indictment), the defendant may be convicted on the single testimony of one witness swearing to this contradictory deposition of the defendant himself.

For these reasons I think the conviction right.

*Conviction affirmed.*

It seems to have been formerly thought that in proof of the crime of perjury two witnesses were necessary; but this strictness if it ever was the law, has long since been relaxed. In a very recent case, Erle C. J. stated the true principle of the rule in his usual lucid manner: "It is well ascertained law that, upon an indictment for perjury, it is necessary to have more than the evidence of one witness alone; for that is but the oath of one against one, which leaves the matter even, and entitles the prisoner to an acquittal. The prosecution must do more than that. They must turn the scale by corroborating their witness. The degree of corroboration, however, which is necessary is not definable; and any attempt to define it will prove illusory. It must be something which, in the opinion of the tribunal before which it is brought, is deserving of the name of corroboration." *Regina v. Shaw*, Leigh & Cave C. C. at p. 590. And see *Jorden v. Money*, 5 House of Lords Cases, at pp. 231, 232, per Lord Brougham; *The State v. Molier*, 1 Devereux, 263.

In *Commonwealth v. Parker*, 2 Cushing, 222, the principle discussed in the principal cases, was clearly stated by Mr. Justice Dewey, as follows: "The question of more difficulty in the present case is that arising upon the other point, namely, the competency and sufficiency of the evidence relied upon to establish the falsity of the testimony given by the defendant. If we are to adopt the rule sometimes stated as the proper one upon this point, to wit, that there must be two witnesses swearing directly to the fact, this objection might be strongly relied upon. A brief reference to a few leading authorities will clearly show, that this rule, if it ever existed, has been much qualified. The rule, as stated by Parker C. J. in the case of *The Queen v. Muscot*, 10 Modern, 193, is

as follows: 'There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and therefore a credible and probable witness shall turn the scale in favor of either party: but in the former, presumption is ever to be made in favor of innocence; and the oath of the party will have a regard paid to it, until disproved. Therefore, to convict a man of perjury, a probable, a credible, witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath.' In the case of *Woodbeck v. Keller*, 6 Cowen, 118, it is said, that if there be only one witness, and circumstances strongly corroborative, it is enough. In *The State v. Hayward*, 1 Nott & M'Cord, 547, it was held, that two witnesses are not necessary to disprove the fact sworn to by the defendant; but when there is but one witness, some other evidence must be adduced in addition to his testimony. The rule, as stated by Mr. Greenleaf, 1 Greenl. Ev. § 257, is this: 'The evidence must be something more than sufficient to counterbalance the oath of the defendant and the legal presumption of his innocence. But it is not precisely correct to say, that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner, as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances, before the party can be convicted: '—thus adopting the views of the court as held in 6 Cowen, above cited. The case of *the United States v. Wood*, 14 Peters, 440, has gone, perhaps, still further; holding that no living witness, not even one, is absolutely requisite; but that documentary or written evidence may be of such a character, as to produce that high degree of evidence, requisite to overcome the oath of the defendant and the presumption of innocence. The treatises of Phillipps, and Russell, 1 Phillipps Ev. 115, and 2 Russell, 548, seem fully to sustain the general rule, that where there are corroborating circumstances, proved by independent evidence, the proof is sufficient. The case of *Rex v. Mayhew*, 6 Carrington & Payne, 315, seems to be quite analogous to the present, as to the point there settled, namely, that 'even a letter, written by the defendant, contradicting his statement upon oath, would be sufficient to make it unnecessary to have a second witness.' Without extending these citations further, we may safely assume, that the rule requiring two living witnesses, in contradiction to the statement of the defendant, if it ever existed, has long since been relaxed; and that all that is requisite to a conviction of perjury is, that, in addition to one directly opposing witness, there should be established, by independent evidence, strong corroborating circumstances, of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence."

An indictment for perjury alleged that in the month of June 1851, the prosecutor had distrained upon the prisoner for certain arrears of rent, and that the prisoner on a trial at nisi prius falsely swore that there was only one quarter's rent due at the time of the said distress. On the trial for perjury the prosecutor positively swore to the fact of there being five quarters' rent due at the time of the said distress; and produced his books by which he refreshed his memory; and for the purpose of corroborating his statement and showing by the oaths of two witnesses the falsity of the matter sworn to, the son of the prosecutor de-

posed to a conversation with the prisoner in August 1850, in which the prisoner admitted that three or four quarters of the said rent were then due. The jury convicted; but, upon a case reserved, the Judges were unanimously of opinion that this was not sufficient corroboration. There was nothing in the evidence of the son relevant to the issue. There was a year's interval between the transaction he spoke of and the time when the distress was made, and the money might have been paid intermediately. The oath of the son was quite as consistent with the oath of the prisoner as with that of the prosecutor. In perjury there must be something to induce the jury to believe one rather than the other. In this case there was no such evidence. *Regina v. Boulter*, 2 Denison C. C. 396; 3 Carrington & Kirwan, 236; 5 Cox C. C. 543.<sup>1</sup>

An indictment for perjury committed on the trial of a civil bill alleged that the prisoner, Thomas Towey, falsely swore that "the note produced is not my handwriting, or any part of it, and the name 'Thomas Towey' as a witness is not in my handwriting." The note purported to bear the marks of Patrick and James Towey as makers of the note, and had on it, "Witness present, Thomas Towey." The payee of the note could not read, but he identified the note, and swore that he saw Thomas Towey write on the paper, and saw Patrick and James put their marks on it. Another witness proved that he had subpoenaed Thomas Towey to appear at the sessions as a witness, and that the prisoner then said that there was no occasion to test him; that he would go to prove the note; and that at a meeting between the parties to try to settle the civil bill, on the payee of the note saying he had James Towey's note, and would take the law on it unless he signed a new one, Thomas said that he had been tested (subpoenaed) to come there, but that there was no occasion to test him; that he would prove the note. But the note was not produced at this meeting; and, upon a case reserved, it was held that this evidence was a sufficient corroboration of the evidence of the payee. The prisoner was the only witness to the note, and he could only prove it in his character as a witness, and therefore when he said he could prove it, it came to sufficient evidence that he was the witness to the note. *Regina v. Towey*, 8 Cox C. C. 328.

In *Regina v. Virrier*, 12 Adolphus & Ellis, 317; 4 Perry & Davison, 161, where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment on the facts contained in the other assignments. The indictment stated that the defendant swore that Mr. B. and Mr. C. came to her husband's house, that Mr. C. said, "I will give him the £6 at Christmas," and Mr. B. shook hands with her, and put something into her hand, and told her to give it to her husband, and that it was a sovereign wrapped up in some paper;

<sup>1</sup> In a recent text-book it is observed: "We apprehend that the old rule and reason of the matter are not satisfied unless the evidence of each witness has an existence and probative force of its own, independent of the other; so that supposing the charge were one in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury; or at least raise a strong suspicion of the guilt of the defendant." Best on Evidence, § 609, 4th ed. Willes J. in *Regina v. Briggs*, Dearsly & Bell C. C. at p. 102, characterized this as "one of the best books on our laws."

and Mr. C. told her he should not forget it was in his power to give her husband the £6 at Christmas. The assignments of perjury were, first, that Mr. C. did not say that he would give the £6 at Christmas; secondly, that Mr. B. did not put a sovereign into the hand of the defendant; and thirdly, that Mr. C. did not tell the defendant that he should not forget it was in his power to give her husband the £6 at Christmas. Evidence was given in support of all the assignments of perjury. Lord Denman C. J., in summing up, said that as to the second assignment the proof lay almost entirely in the evidence of one witness, and therefore he did not see how the jury could convict of the perjury imputed; but that on the others there was a distinct contradiction of the defendant's testimony by Mr. C., who was supposed to have offered the £6, and several other witnesses; and he left it to the jury to say whether there was not a strong body of evidence clearly supporting Mr. C's denial. But where upon an indictment for perjury, alleged to have been committed in making a charge of an unnatural offence, in which the defendant had deposed that he saw the prosecutor committing the offence, and saw the flap of his trousers unbuttoned, and that he was there five minutes; and to disprove this the prosecutor swore that he did not commit the offence, and that his trousers had no flap on; and to confirm him his brother proved that at the time in question the prosecutor was only absent three minutes, and that the trousers he had on, which were produced in court, had no flap. Patteson J. held that the corroborative evidence was quite sufficient to go to the jury; and upon a case reserved, the Judges held the conviction right. *Regina v. Gardiner* 2 Moody C. C. 95; 8 Carrington & Payne, 737. So where perjury was alleged to have been committed by the defendant, who was an attorney, in an affidavit made by him to oppose a motion to refer the defendant's bill of costs to taxation, and to prove the perjury one witness was called, and in lieu of a second witness it was proposed to put in the defendant's bill of costs delivered by him to the prosecutor; it was suggested that this was not sufficient, as the bill had not been delivered by the defendant on oath. Lord Denman C. J.: "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." *Rex v. Mayhew*, 6 Carrington & Payne, 315. In *Commonwealth v. Parker*, 2 Cushing, 222, the charge in the indictment for perjury, was, that the defendant had testified that no agreement for the payment by him of more than the lawful rate of interest had ever been made between him and a person to whom he was indebted upon certain contracts, it was held that the testimony of the creditor to the existence of such an agreement, corroborated by the letters of the defendant to him, containing a direct promise to pay more than legal interest on a demand then held by such creditor, if the payment could be delayed, and apologizing for a delay which had already taken place in the payment of another demand, and promising to pay a bonus for the delay, was competent and sufficient evidence of the falsity of the statement alleged as the perjury.

In *Regina v. Shaw, Leigh & Cave* C. C. 579; 10 Cox C. C. 66, the prisoner was indicted for perjury alleged to have been committed by him before magistrates, when summoned as a witness on behalf of a publican by the name of Kilshaw, who was charged with keeping his house open on a Sunday, at Burton-



wood, during prohibited hours. The charge of perjury was that the prisoner swore that he was not in Burtonwood on the Sunday, on which a policeman had sworn that he had seen him in Kilshaw's house at a certain hour in the afternoon. For the prosecution, in addition to the evidence of the policeman, one witness swore that he saw the prisoner in Burtonwood, on the Sunday in question; and another that he saw him close to Kilshaw's house about the time spoken to by the policeman. All of the Judges were of opinion that the evidence of the policeman was sufficiently corroborated.

Where a prisoner was indicted for falsely swearing that he had paid J. Bland a certain sum of money on a particular occasion, and Bland swore that he received the money in packages, and afterwards counted it, and found it £7 short; and the only corroboration of his statement was by another person, who also counted it, but had not been present when the money was received; it was held that this was no corroboration at all. *Regina v. Braithwaite*, 1 Foster & Finlason, 638; 8 Cox C. C. 444. *Watson B. and Hill J.* As reported in Cox it is stated that "the prosecutor took it without counting it, and carried it to a Mrs. Watson's, and counted it over." In Foster & Finlason that "the prosecutor took it without counting it, and carried it to an adjacent lane, where he counted a part of it and found it wrong; he then gave it to a Mrs. Watson, and asked her to count it over." Mrs. Watson was the witness called to corroborate Bland. An indictment alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child. A witness other than D. Rees proved that the prisoner had said that D. Rees "had never touched her clothes," at a time when she generally denied being in the family way; and Martin B. thought that though, under some circumstances, such a statement might have been a sufficient corroboration of the evidence of D. Rees, yet this negation was so far a part of the general denial that the jury could not safely convict upon it alone. *Regina v. Owen*, 6 Cox C. C. 105.

If the evidence adduced in support of the crime of perjury, consists of two opposing statements made by the prisoner on oath, one of which is directly at variance with the other, and nothing more, he cannot be convicted. In *Mary Jackson's Case*, 1 Lewin C. C. 270, Holroyd J. said to the jury: "Although you may believe, that on one or other occasion she swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances, at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false." And it is to be observed that when a man swears to the best of his recollection, it requires very strong proof to show that he is wilfully perjured. Tindal C. J. in *Regina v. Parker*, Carrington & Marshman, at p. 645.

In *Rex v. Mudie*, 1 Moody & Robinson, at p. 129, Lord Tenterden C. J. doubted whether the rule, which requires two witnesses, was satisfied by several witnesses, each supporting a separate assignment of perjury, but no two speaking to the same assignment. But the defendant was acquitted on another ground. It has since been held, that the rule that requires two witnesses, or one witness and

some sufficient corroboration, applies to every assignment of perjury in an indictment. Where, therefore, an indictment contains several assignments of perjury, it is not sufficient to disprove each of them by one witness; but in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborating evidence, to negative the truth of the matter contained in such assignment. The prisoner was indicted for perjury alleged to have been committed in an affidavit to obtain a criminal information, in which he had sworn that he had paid all his debts except two, as to which there was an explanation, and there were several assignments of perjury averring that he had not paid certain persons who were named (besides the two excepted ones), and such persons proved that they had not been paid, but only spoke to their respective debts not having been paid. Tindal C. J. held that this was not sufficient, and that as to *each* debt there should be the testimony of two witnesses, or of one witness, and such confirmatory evidence as was equivalent to the testimony of a second witness. *Regina v. Parker, Carrington & Marshman*, 639.

The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the court, the proceedings in it, the administering the oath, the evidence given by the prisoner (*Commonwealth v. Pollard*, 12 Metcalf, 225) and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient were the prisoner charged with any other offence. 2 Hawkins P. C. ch. 46, § 10. 3 Russell on Crimes, 85. 4th ed. Moreover, when several facts must be proved to make out an assignment of perjury, each of these facts may, in strict law, be established by the uncontroverted testimony of a single witness. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury. *Regina v. Roberts*, 2 Carrington & Kirwan, 614, Patteson J. In the course of the argument in *Regina v. Boulter*, 2 Denison C. C. at p. 398, *Regina v. Roberts* was cited, and Cresswell J. said: "Assume this to be the case; perjury assigned, that A. B. and C. D. were not together at such a place upon a particular day. You have two witnesses to disprove this. One says, I saw them together in the place; the other swears that he saw them somewhere else together in the direction of the place, on the same day; that would tend to prove the fact of their being together in the place in question." And Coleridge J.: "Suppose a man swore that he was not at Plymouth on such a day. One witness swears that he saw him in Plymouth on that day; and to corroborate his evidence, a person is called who states that he saw him in the railway train between the terminus and Plymouth."

The application of this rule is not confined to criminal cases. In an action of slander in accusing a party of perjury, in order to sustain the defence of justification on the ground of the truth of the charge, the same amount of evidence is required as on the trial of an indictment for perjury to warrant a conviction of the defendant. *Woodbeck v. Keller*, 6 Cowen, 118. *Roberts v. Champlin*, 14

Wendell, 120. In Massachusetts, by statute, a special action on the case lies against a person summoned as a trustee in foreign attachment, who knowingly and wilfully answers falsely, upon his examination on oath. Rev. Sts. ch. 109, § 76. Gen. Sts. ch. 142, § 14. These principles in the law of evidence apply to this class of actions. *Laughran v. Kelly*, 8 Cushing, 199.

Finally, it may be observed that where a statement made by a prisoner is in the nature of an admission that a previous statement on oath is false, it is to be dealt with as a confession, and not as falling within the class of cases discussed in this note. *Cessante ratione legis, cessat ipsa lex*. See the judgment of Byles J. in *Regina v. Hook*, ante, p. 88, in the text.

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### WRIGHT v. CLEMENTS.<sup>1</sup>

April 25, 1820.

#### *Indictment — Written Instruments.*

Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, in substance as follows; and then set out the libel with innuendoes: *Held*, that this was bad on motion in arrest of judgment.

The word "tenor" imports an exact copy, and that the libel is set out in words and figures.

DECLARATION stated that defendant, contriving &c. falsely &c. did publish, and did cause and procure to be published, a certain false, scandalous, malicious, and defamatory libel, in the form of a statement, purporting to be written by one William Cobbett, of and concerning the plaintiff, containing amongst other things, certain false, scandalous, malicious, defamatory, and libellous matters, of and concerning the said plaintiff, in substance, as follows; that is to say: it then proceeded to set out the libel with innuendoes. The plaintiff having obtained a verdict for £500 damages, at the Middlesex sittings after last Michaelmas term, before ABBOTT C. J., a rule was obtained in Hilary term for arresting the judgment, on the ground that the declaration was defective in stating the libel to be set out in substance only, and not according to the tenor. And now

*Scarlett, Denman*, and *Chitty* showed cause. This rule was obtained on the authority of the case of *Newton v. Stubbs*, 2 Shower, 435; 3 Modern, 71. There the declaration stated the words spoken to be to the effect following, and that was held to be bad in arrest

<sup>1</sup> 3 Barnewall & Alderson, 503.

of judgment. That case, however, does not apply to the present; for taking the whole declaration together, it appears that the very words of the libel are set out, for there are innuendoes which would be unnecessary, if the declaration purported to set out only the substance or effect. It is sufficient, at all events, after verdict, if the declaration imports to set out the substantial matter of the libel. In *The Queen v. Drake*, 3 Salkeld, 225, Holt C. J. says: "A libel may be described either by the sense or by the words, and therefore an information charging that the defendant made a writing containing such words, is good, and in such a case a nice exactness is not required because it is only a description of the sense and substance of the libel." That is an authority to show that it is sufficient to set out the substance of the libel. In *The King v. Bear*, 2 Salkeld, 417; 1 Lord Raymond 414, the declaration purported to set out the libel according to the tenor and effect following, and it was held, that although the words to the effect following of themselves might be bad, yet that coupled with the word tenor, which imported a literal copy, they might be rejected. It is not, however, necessary to set out the literal copy of a libel, for the variance of a letter not altering the sense is immaterial, and that shows that it is sufficient to set out the substance of the libel. Admitting it, however, to be necessary to give in evidence the precise words of the libel, it is sufficient, after verdict, that it should be so stated on the record that there is no positive repugnancy between the mode of stating it, and the necessity of proving the precise words. Now there is nothing in the words "in substance as follows," which dispenses with the necessity of proof of the very words of the libel; for the innuendoes show that the plaintiff undertakes to prove the precise words. In the course of the argument, they cited *Wood v. Brown*, 1 Marshall, 522; 6 Taunton 169, and *Rex v. Leefe*, 2 Campbell, 138.

*Platt contra.* The words "in substance as follows," form a material part of the description of the libel, and cannot, therefore, be rejected. In actions for oral or written slander, it is not sufficient to set out the substance, but the very words must be stated upon the record, in order that the court may judge whether they be actionable or not; if it were sufficient to set out the substance, the verdict of the jury would be conclusive upon that point, and the party would be deprived of his writ of error. In *Zenobio v. Axtell*, 6 Term R. 162, it was held to be insufficient, in an action

for a libel written in a foreign language, to set out the translation, which, if correct, however, would have contained the substance of the libel. *Cook v. Cox*, 3 Maule & Selwyn, 110, is precisely in point. The declaration there stated that the defendant accused the plaintiff of being in insolvent circumstances, without setting out the words; and the court, upon argument, held it to be bad, after verdict, upon principle and authority. This declaration cannot be supported.

ABBOTT C. J. I am of opinion, that in this case the objection must prevail, and that the judgment must be arrested. In actions for libel, the law requires the very words of the libel to set out in the declaration, in order that the court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this, is to state, that defendant published, of and concerning the plaintiff, the libellous matters, to the tenor and effect following. In that case the word "tenor" governs the word "effect," and binds the party to set out the very words of the libel. There is another mode of doing it, by stating that defendant published the libellous matters following; that is to say. And in this case, also, it is understood, that the very libel is set out. Here however more words have been introduced into the declaration, and the question is, whether the additional words have not varied the sense. The allegation here which has departed from the common form of the precedents is, that the defendant published certain libellous matter, in substance as follows. Now the question is, whether the words "in substance" do not give a different meaning to the passage which follows. It seems to me that they do; for we are to understand these words in their ordinary sense. Suppose a person were to say, I have read a book concerning certain interesting historical questions, in which is contained a passage, in substance as follows; no man would understand him to be about to repeat the very words of the passage, but only that he was about to give an abstract of it. So it is that I understand this declaration. It is true, that in pleading, many words have obtained an appropriate and technical sense, different from their popular meaning; and if that had been the case with the words "in substance," it might have varied the present question: but it is not so, and those words must, therefore, be understood in their ordinary sense. I think, therefore, that the plaintiff in his declara-

tion, not having professed to set forth the very words of the libel, but only their substance and effect, and, as it were, a sort of abstract of them, judgment must be arrested. It is of great importance to follow the ancient form of precedents; for if we depart from them in one instance, one deviation will naturally lead to another, and, by degrees, we shall lose that certainty which it is the great object of our system of law to preserve.

BAYLEY J. I am of the same opinion. A defendant in a case like this, has a right to expect that the plaintiff in his declaration, will set out the very words used, or so much of them as he means to rely upon; and the usual mode of doing this has been already stated by my Lord Chief Justice. The word "tenor" has in law, a peculiar and technical sense, and the distinction between it and "substance" is directly pointed out by Buller J. in *Rex v. May, Douglas*, 193, where he says, that "The word tenor has so strict and technical a meaning, as to make it necessary to recite verbatim; but that by the expression, 'manner and form following,' used in that case, nothing more than a substantial recital was requisite." Here it is stated that defendant published certain false and libellous matters, in substance, as follows; the latter words, therefore, qualify those which precede and would let the party in at nisi prius to looser proof than would have been required in case the declaration had stated the libel verbatim. Then if the law requires the libel itself to be stated, how can a declaration be sufficient which states the libel in substance only? For two statements which may differ in words may agree in substance. Besides if it be sufficient to set out a libel in substance, who is to decide whether it is proved, the judge or the jury? And if they differ the defendant might be deprived of the judgment of the court out of which the record comes. I think therefore that if we were to hold this declaration sufficient, we should relax the strictness of proof at present required and depart from the unvaried course of all the precedents. The judgment therefore must be arrested.

HOLROYD J. I am of the same opinion. The old form of declaring was, to state the libel "according to the tenor and effect following," or, "according to the tenor following." And the law attaches a technical meaning to the word "tenor," as signifying either an exact copy or a statement of the libel verbatim. If the usual mode be not followed, but new words substituted for these expressions, the court must understand those new words according to their

popular and ordinary sense. And considering this case in that way, the words "in substance," mean not a literal copy of the libel, but only the general import and effect of it. Now where a charge, either civil or criminal, is brought against a defendant, arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment; and the reason of that is, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the court, whether the facts stated amount to a cause of action, or a crime. For it is clear that when it can be shown distinctly what the instrument is upon which the whole charge depends, that instrument must be shown to the court, in order that they may form their judgment. A defendant is not bound to put the question as a combined matter of law and fact to the jury, but has a right to put it as a mere question of law to the court. This mode of declaring would not only deprive him of that advantage, but also of his writ of error; and it would make the verdict of a jury binding in cases where it ought not to be so. For if the jury find the verdict that the libel proved was in substance the same as the charge in the declaration, contrary to the opinion of the Judge, that would be binding upon the parties, and the defendant could bring no writ of error, even although the whole might be a question of law. I think, therefore, that this declaration is bad, and that the judgment must be arrested.

BEST J. was absent at the Old Bailey.

*Rule absolute.*

It is a general rule of pleading, at common law, in civil as well as in criminal cases, that written instruments, wherever they form a part of the gist of the offence charged, must be set out in the declaration or indictment verbatim; and where part only thereof is included in the offence, that part alone is necessary to be set out. 2 Gabbett Crim. Law, 231. Thus in the case of forgery, the instrument forged must be set out in the indictment in words and figures. *Rex v. Lyon*, 2 Leach C. C. (4th ed.) 597. *Rex v. Mason*, 2 East P. C. 975; 1 East 180 note. *The State v. Gustin*, 2 Southard, 744. *The State v. Twitty*, 2 Hawks, 248. *Stephens v. The State*, Wright, 70. An indictment for a libel must set out the very words of which the alleged libel is composed, or of that part of it which is the subject of the indictment. *Commonwealth v. Wright*, 1 Cushing, 46. *Commonwealth v. Sweney*, 10 Sergeant & Rawle, 173. *Zenobia v. Axtell*, 6 Term R. 162. The word "tenor" imports an exact copy, and that it is set out in words and figures. Marks of quotation, to distinguish the libellous matter, are not sufficient to indicate that the words thus designated are the very words of the alleged libel. *Commonwealth v. Wright*, 1 Cushing, 46. But the omission in an indictment for a libel of the date and signature at the end of the libel, not

affecting the meaning, is not a variance. *Commonwealth v. Harman*, 2 Gray, 289. In an indictment for a contempt in not executing a warrant, the nature and tenor of the warrant must be shown verbatim; *Rex v. Burrough*, 1 Ventris, 305; *Comyns's Digest*, Indictment, G. 3; and in an indictment for sending a threatening letter, the letter must be set out. *Rex v. Lloyd*, 2 East P. C. 1122.

It has been recently held in England, upon a case reserved, where the defendant was indicted for fraudulently offering a "flash note" in payment, under the pretence that it was a Bank of England note, that an instrument need not be set out in an indictment, except where the court could derive assistance from seeing a copy of it on the record; as where the case turns on the nature and character of the instrument, as distinguished from its quality of good or bad. *Regina v. Coulson*, Temple & Mew C. C. 332, 335; 4 Cox C. C. 227; 1 Denison C. C. 592 (1850). In this case, Chief Justice Wilde said: "It is unnecessary to set out the instrument in those cases where it cannot be of any use to the court, in order that they may arrive at the conclusion, whether it is or is not a valid document. Had it been stated in the indictment as a certain paper purporting to be a good and valid promissory note, and that it was not a good and valid promissory note, it might have been necessary to set it out, in order that the court might have seen whether it was or was not. In this case, the court could not have derived any assistance whatever from setting the paper out; for all that appears upon the indictment, it might have been nothing but hieroglyphics. The indictment states that it was a certain paper produced by the prisoners which they falsely pretended was a good and valid promissory note, whereas it was not. Where the note is required to be set out, something has turned upon the nature of the note, rendering it necessary that the court should see it."

The indictment must not only set out the tenor of the instrument, but it must profess so to do. The word "tenor" imports an exact copy; that it is set forth in words and figures, — whereas the word "purport" means only the substance or general import of the instrument. *Commonwealth v. Wright*, 1 Cushing, 46. *The State v. Bonney*, 34 Maine, 383. *Rex v. Gilchrist*, 2 Leach C. C. (4th ed.) 660. When the instrument is set forth according to its tenor, no technical form of words is necessary for expressing that it is so set forth. Therefore it was decided, that the words, "a certain receipt for money, as follows, that is to say," were as certain as if it had been said "according to the tenor following, or, in the words and figures following, that is to say." *Rex v. Powell*, 1 Leach C. C. (4th ed.) 77; 2 East P. C. 976; 2 Wm. Blackstone, 787. And if any other words are used which imply that a correct recital is intended, the instrument must be set out correctly, even though in the particular case the pleader need not have set out more than the substance of the instrument. And so strict was this rule conceived to be, that in one case it was made a question, whether substituting the word "undertood" for "understood," was not a fatal variance. *Rex v. Beach*, Cowper, 229; 2 Leach C. C. (4th ed.) 133. And in another case, the changing the words "value received" into "value reiceved," in setting forth the instrument, was insisted on as a fatal objection to the indictment. *Rex v. Hart*, 1 Leach C. C. (4th ed.) 145; 2 East P. C. 977. These objections were, however, overruled, upon the principle established in *Regina v. Drake*, namely, that unless the omission or addition of a letter does so change the word as to make it another word, the variance is not



material. 2 Salkeld, 660. *Regina v. Wilson*, 1 Denison C. C. 284; 2 Carrington & Kirwan, 527. Purcell Crim. Pl. 84. *United States v. Hinman*, Baldwin, 292. *The State v. Bean*, 19 Vermont, 530. *The State v. Weaver*, 13 Iredell, 491. *Commonwealth v. Gillespie*, 7 Sergeant & Rawle, 469, 479. And in another case, it was at first doubted whether the indictment was sufficiently proved, because it included the *attestation* of the witness, and the words "Mary Wallace, her mark," in the tenor of the note charged to have been forged; the fact being, that when the prisoner subscribed the note, those parts of it were not then written. But Perrott B. and Aston J. whom the recorder consulted, being of opinion that the indictment was well proved, he directed the jury accordingly. For which decision this reason may be assigned, that the addition of the attestation of the witness, and of the words "his or her mark," were, on this occasion, as they usually are, concomitant with that mode of executing the instrument, and a part of the same transaction. *Rex v. Dunn*, 2 East P. C. 976. 1 Gabbett Crim. Law, 371. On the other hand, if the matter of a written instrument be introduced by words which imply that the substance only, and not the very words, of the instrument, is set out; as, for instance, by the words "in substance, as follows," *Wright v. Clements*, 3 Barnewall & Alderson, 503; or, "to the effect following," *Rex v. Bear*, 3 Salkeld, 17; or, "in manner and form following," *Rex v. May*, 1 Douglas, 193; 1 Leach C. C. (4th ed.) 227, or the like, if the instrument produced in evidence be in substance the same with that set out, it will be sufficient. 1 Starkie Crim. Pl. (ed. 1828) 255, 256. Archbold Crim. Pl. (14th ed.) 183.

In indictments for forgery, &c. the instrument is sometimes described as the instrument, and sometimes as purporting to be the instrument, the counterfeiting of which is prohibited by the statute on which the indictment is framed; and the latter mode of describing it has been held to be equally good as the former. And it has been said, that in strictness of language, there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument. 2 East P. C. 980. 1 Gabbett Crim. Law, 371. Where the prisoner was indicted for forging and knowingly uttering a bill of exchange, described in the indictment to be a "certain bill of exchange, requiring certain persons, by the name and description of Messieurs Down, &c. twenty days after date, to pay to the order of R. Thompson, the sum of £315, value received," and signed by Henry Hutchinson for T. G., and H. Hutchinson, &c.; and the indictment then proceeded to set out the bill; on proof that the signature, "Henry Hutchinson," was a forgery, it was objected that the indictment averring it to have been *signed by him*, and not merely that it *purported* to have been signed by him, which was a substantial allegation, was disproved; and the case being referred to the Judges, they held the objection to be a good one. *Rex v. Carter*, 2 East P. C. 985. Where the defendants were indicted and convicted of publishing, as a true will, a certain false, forged, and counterfeited paper writing, *purporting to be the last will* of Sir A. C. &c. the tenor of which was set out, it was objected that it should have been laid that they forged a *certain will*, and not a paper writing, *purporting* &c.; the words of the statute being, "shall forge a will;" but, after a variety of precedents were produced, the Judges held it to be good either way. *Rex v. Birch*, 1 Leach C. C. (4th ed.) 791; 2 East P. C. 980; 2 Wm. Blackstone, 790.

It is to be well observed that by the words, "purporting to be," is to be under-

stood the apparent, and not the legal, import of the instrument; whereas the "tenor" of an instrument means the exact copy of it. And accordingly, where the instrument was laid in some counts of the indictment to be a paper writing purporting to be a bank-note, it was held, that as it did not purport on the face of it, to be a bank-note, not having been signed, the conviction could not be supported; though it was in evidence in this case, that the bank frequently paid bank-notes which are filled by their officers, and entered by them, though they happen not to be signed; but the case was decided upon the principle, that though there need not be an exact resemblance to the thing supposed to be forged, yet the forged instrument must at least have the principal constituent parts of that which it is intended to represent; which was wanting in this case. *Rex v. Jones*, 1 Douglas, 300; 1 Leach C. C. (4th ed.) 204. And where the bill was directed to John Ring, and the acceptance was by John King, the indictment having stated that the bill purported to be directed to John King by the name of John Ring, and that the prisoner forged the acceptance in the name of John King, the judgment was arrested, because the bill did not, in fact, purport to be drawn on or directed to John King, as laid in the indictment; for the name and description of one person or thing could not purport to be another. *Rex v. Reading*, 1 Leach C. C. (4th ed.) 590; 2 East P. C. 952, and 981. And so where a check or order for payment of money was in fact directed to Messrs. *Ransom, Moreland, and Hammersley*, but in the indictment it was described as a paper writing, &c. purporting to be directed to *George Lord Kinnaid*, W. Moreland, and T. Hammersley of &c. bankers and partners by the name and description of Messrs. *Ransom, Moreland, and Hammerley*, upon a conference of the Judges, the judgment was arrested, upon the principle above laid down, that the purport of an instrument meant the substance of it, as it appeared on the face of the instrument to every eye which read it; and that this check or order could not purport to be directed to Lord Kinnaid, as his name did not appear on the face of it; the blunder having arisen from the circumstance that Lord Kinnaid and Messrs. Moreland and Hammersley had carried on the business of bankers under the firm of Messrs. *Ransom, Moreland, and Hammersley*. *Rex v. Gilchrist*, 2 Leach C. C. (4th ed.) 657; 2 East P. C. 982. And see *Rex v. Edsall*, 2 East P. C. 984; *Rex v. Reeves*, 2 Leach C. C. (4th ed.) 808; *Rex v. Birch*, 1 Leach C. C. (4th ed.) 79; 2 East P. C. 980; 2 Wm. Blackstone, 790.

But it is not always sufficient to set out the instrument according to its tenor. As where the indictment was framed upon 43 Geo. III. ch. 139, for the forgery of a Prussian treasury note, and the instrument was set out on the record, and stated in the several counts to be "a promissory note for the payment of money," "an undertaking for the payment of money," and "an order for the payment of money," and the prisoner being convicted, his counsel moved in arrest of judgment, on the ground that the false instrument was here set out only in a foreign language, and not translated or explained by other averments on the record; and that the object of setting out the instrument in cases of libel and forgery was, that the court may judge whether it be what it is alleged to be, and whether it falls within the statute on which the prosecution is founded; and eight of the ten Judges, who met to consider the case, were of opinion that the objection was good; and judgment was accordingly arrested. *Rex v. Goldstein, Russell & Ryan* C. C. 473. And where the instrument alleged to be forged was described

in the indictment as "a certain paper instrument partly printed and partly written," though the instrument was set forth in the very words and figures of it, yet the Judges, upon a case reserved, held the indictment to be bad, as it did not state what the instrument was, in respect of which the forgery was alleged to have been committed, nor how the party signing it had authority to sign it. *Rex v. Wilcox*, Russell & Ryan C. C. 50. And where the tenor of the receipt, as set out in the indictment, was, "1825, rec<sup>d</sup> H. H.," and no averment or innuendo to explain what was meant by these initials, the indictment was held to be insufficient. *Rex v. Barton*, 1 Moody C. C. 141. See *Regina v. Inder*, 1 Denison C. C. 325; 2 Carrington & Kirwan, 635.

Though it is in general sufficient to charge that the defendant forged such an instrument, naming it, or describing it as *purporting* to be such an instrument as is within the words and meaning of the statute, &c. or setting forth the tenor of it, yet if the instrument does not purport on the face of it, and without reference to some other subject-matter, to be the thing prohibited to be forged, then such other subject-matter must be referred to in the indictment, and connected with the forgery by proper averments. 1 Gabbett Crim. Law, 374. 2 East P. C. 977. Thus where the indictment charged the prisoner with forging a receipt to an assignment of a certain sum in a navy bill, and the tenor of the receipt merely consisted of the signature of the party, it was held to be defective on the ground that the mere signing of such name, unless connected with the practice of the navy office, did not purport on the face of it to be a receipt, and that it ought to have been averred, that such navy bill, &c. together with such signature, did purport to be, and was, a receipt, &c. and that the prisoner feloniously forged the same; and that it was not sufficient, as here, to allege generally, that the prisoner forged a receipt, which was a conclusion of law; but facts must be stated to show the court that such conclusion was true. *Rex v. Hunter*, 2 Leach C. C. (4th ed.) 624; 2 East P. C. 928, 977. But the words, "Settled, Sam. Hughes," written at the foot of a bill of parcels, were held of themselves to import a receipt or acquittance, and that no averment was necessary; that the word "settled," meant a receipt or acquittance. *Rex v. Martin*, 1 Moody C. C. 483; 7 Carrington & Payne, 549, overruling *Rex v. Thompson*, 2 Leach C. C. (4th ed.) 910. And see *Rex v. Houseman*, 8 Carrington & Payne, 180; *Regina v. Vaughan*, 8 Carrington & Payne, 180; *Regina v. Boardman*, 2 Moody & Robinson, 147; *Regina v. Rogers*, 9 Carrington & Payne, 41. And where, on an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus: "18th March 1773. Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written, it was held sufficient. *Rex v. Testick*, 2 East P. C. 925.

A railroad ticket does not state in terms any contract in detail, but only abbreviations and words from which a contract may be inferred and legally stated. In an indictment for forging a railroad ticket, it is not enough to set forth the instrument merely in the abbreviated form in which it is printed, but it must be accompanied by other averments stating the legal contract, and showing some valuable legal interest arising from the possession and ownership of such instrument or ticket. In an indictment for forging a railroad ticket, expressed on its face to be "good this day only," a description of the

ticket as signifying to the holder that it must be used continuously, and without stopping at intermediate stations, after once entering the cars, is a fatal variance. The averment as to the contract should have been that the ticket was good for one day only, or required the entire trip to be made in one day. *Commonwealth v. Ray*, 3 Gray, 441.

When the indictment is founded upon a statute, it must, in general, according to the rule of pleading which is applicable to all offences, set forth the charge in the very words of the statute describing the offence; equivalent words not being sufficient. 1 Gabbett Crim. Law, 376. But in a recent English case it has been held, that if the instrument be set out in *hæc verba*, a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable. In this case Parke B. said: "The question may be very different if the indictment sets out the instrument from what it would be if it merely described it in the terms of the statute. In the former case, the matter which it is contended is descriptive, may be mere surplusage, for when the instrument is set out on the record, the court are enabled to determine its character, and so a description is needless. *Regina v. Williams*, 2 Denison C. C. 61; *Temple & Mew C. C.* 382. 4 Cox C. C. 256 (1850). In this case the indictment charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," &c. It was objected that the paper being only a request, did not support the indictment, which described it as a warrant, order, and request. But it was held that there was no variance, as the document being set out in full in the indictment, the description of its legal character became immaterial. Parke B. suggested that the correct course would have been, to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says Denison, "that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the indictment itself, all the descriptive averments may be treated as surplusage. The principal case seems reconcilable with *Regina v. Newton*, 2 Moody C. C. 59, but to overrule a decision of Wightman J. in *Regina v. Williams*, 2 Carrington & Kirwan, 51." In *Regina v. Charretie*, 3 Cox C. C. 503, Davison, *amicus curiæ*, mentioned that Cresswell J., in a subsequent case, had declined to act upon the authority of *Regina v. Williams*, 2 Carrington & Kirwan, 51.

*Commonwealth v. Castles*, 9 Gray, 123, was decided on a principle similar to that of the preceding case, *Regina v. Williams*, 2 Denison C. C. 61; *Temple & Mew C. C.* 256, and 4 Cox C. C. 256. This was an indictment for uttering as true a forged indorsement of a "promissory note." The note and indorsement were set out according to their tenor. It was decided that it is not necessary that the indictment should in terms aver that the forgery charged was of the "indorsement of a promissory *for the payment of money*." "These," said Bigelow J., "it is true, are the words of the statute. But it is not essential that they should be used in the indictment. It is sufficient if it appears on

the face of the indictment by proper averments, that the instrument forged is of the particular kind prohibited by statute. Or if it can be collected from the forged writing, itself, as set out in the indictment, that it assumes to be an instrument the false making of which is forgery. In the present case, the note on which the indorsement is alleged to have been forged is set out according to its tenor; by which it clearly appears that it was in fact a promissory note for the payment of money. The indictment conforms to the well established precedents. But if this were not so, it would not follow that the indictment was bad. If it did not sufficiently aver a forgery of an instrument within the statute, it might nevertheless be good, as charging the offence of forgery at common law."

In an indictment for libel, besides setting out the libellous passage of the publication, the indictment must also contain such averments and innuendoes as may be necessary to render it intelligible, and its application to the party libelled, evident. When the statement of an extrinsic fact is necessary in order to render the libel intelligible, or to show its libellous quality, such extrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, this is done by an innuendo. And an innuendo can explain only in cases where something already appears upon the record to ground the explanation; it cannot of itself, change, add to or enlarge the sense of expressions beyond their usual acceptance and meaning. *Commonwealth v. Snelling*, 15 Pickering, 321, 335. *The State v. Henderson*, 1 Richardson, 179. *Archbold Crim. Pl.* (14th ed. 644.)

In indictments for passing, &c. counterfeit bank-bills, the number and check-letter, and the words and figures in the margin, and the ornamental parts, and the devices, mottoes, and vignettes need not be set out. *Commonwealth v. Taylor*, 5 Cushing, 605. *Commonwealth v. Searle*, 2 Binney, 332. *Commonwealth v. Bailey*, 1 Massachusetts, 62. *Commonwealth v. Stevens*, 1 Massachusetts, 324. *The State v. Carr*, 5 New Hampshire, 367. It is sufficient to set out what constitutes the contract of the bill; but that must be done truly and precisely. In Massachusetts it has been recently held, that it is a fatal variance in an indictment for uttering and publishing as true, a forged bank-bill, to omit the name of the State in the upper margin of the bill, if it is not repeated in the body thereof. *Commonwealth v. Wilson*, 2 Gray, 70. This was an indictment on Revised Statutes, ch. 127, § 2, charging the defendant with uttering and publishing as true, with intent to defraud, and knowing the same to be altered, false, forged and counterfeit, a certain altered, false, forged and counterfeit promissory note for the payment of money, "of the tenor following, that is to say, President, Directors & Co. of the Atlantic Bank will pay ten dollars to bearer on demand. Portland, March 1, 1851. W. H. Stevenson, Cash. J. B. Osgood, Pres't." The note produced in evidence at the trial, corresponded to the description in the indictment, but also had the words "State of Maine," in the upper margin. And the defendant contended that this was a variance from the note declared on. But the objection was overruled. In delivering the opinion Thomas J. said: "There is a material variance between the instrument produced and that set forth in the indictment. The words 'State of Maine,' are part of the date, and so part of the contract. They fix the situs of the bank, the place where the contract is made and to be performed, and the law by which it is to be interpreted. The case is

clearly distinguishable from those of *Commonwealth v. Bailey*, 1 Massachusetts, 62, and *Commonwealth v. Stevens*, 1 Massachusetts, 324. In the indictment in each of those cases, the entire contract was fully and precisely set out. The words omitted, the number of the bill, and the words and figures at the top or in the margin were immaterial, because the contract was complete without them. The number was held to be affixed for the convenience of the bank only. The figures and words in the margin were but a repetition of those in the body of the note. In the case of *Commonwealth v. Taylor*, 5 Cushing, 605, also the words and figures omitted formed no part of the contract. The words 'three dollars' and 'Mass.' were immaterial, not because they were in the margin, but because they were also in the body of the note, and the contract was complete without them. *Commonwealth v. Taylor* is decided upon the point settled in *Commonwealth v. Bailey*, and *Commonwealth v. Stevens*, that if all that was evidence of the contract was precisely set out, it was sufficient. In the present case, the defect was in omitting that which made part of the evidence of the contract." See 98 Mass. 12, 16.

In an indictment for forging a promissory note, the indorsement need not be set out, though it be forged. It is no part of the note. *Commonwealth v. Ward*, 2 Massachusetts, 397. *Commonwealth v. Perkins*, 7 Grattan, 643. *Simmons v. The State*, 7 Hammond, 116. In *Commonwealth v. Adams*, 7 Metcalf, 50, Wilde J. said: "This case cannot be distinguished from the case of *Commonwealth v. Ward*, 2 Massachusetts, 397; and we know of no authority or principle of law inconsistent with the decision in that case. The case of *The State v. Handy*, 20 Maine, 81, cited by the defendant's counsel, was not an indictment for the forgery of a negotiable note, but of an order, directing an indorsement to be made on a bond. The order directed \$48 to be indorsed, and on the back of the order, there was a direction to add one dollar more. And it was decided that this was an order for \$49, and that it not being so alleged in the indictment, the variance between the allegation and the proof was fatal. That decision, therefore, has no bearing on the present case. In an indictment for forgery, it is necessary, undoubtedly, to set out truly the instrument alleged to be forged. And so it was done in the present indictment, unless the indorsement of the payee is to be considered as a part of the note; and we are clearly of opinion that it is not. The indorsement is evidence of a transfer of the note to the defendant, which was a new contract. This was matter of evidence in support of the allegation that the note was uttered with an intention to defraud the persons named in the indictment; but it is not necessary to set forth the manner in which a party was intended to be defrauded."

Where the instrument on which the indictment rests is in the defendant's possession, or cannot be produced, and there is no laches on the part of the government, it is necessary to aver in the indictment such facts as are sufficient to excuse the nondescription of the instrument, and then to proceed, either by stating its substance, or by describing it as an instrument which cannot be set forth by reason of its loss, destruction, or detention, as the case may be. *Commonwealth v. Houghton*, 8 Massachusetts, 107. *The State v. Bonney*, 34 Maine, 223. *The People v. Badgeley*, 16 Wendell, 53. *Hooper v. The State*, 8 Humphreys, 93. *The State v. Parker*, 1 D. Chipman, 298. *The State v. Potts*, 4 Halsted, 26. *The United States v. Britton*, 2 Mason, 464. *The People v. Kingsley*, 2 Cowen, 522.

An indictment for printing an obscene paper must set it out in the very words of which it is composed; and the indictment must undertake or profess so to do, by the use of appropriate language, unless the publication is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but in this case, a reason for the omission must appear in the indictment, by proper averments. If one of the original printed papers, in an indictment for printing an obscene paper, is attached to the indictment, in place of inserting a copy, it is not a sufficient indication that the paper is set out in the very words. *Commonwealth v. Tarbox*, 1 Cushing, 66. *Commonwealth v. Holmes*, 17 Massachusetts, 336. *The People v. Girardin*, 1 Manning, 90. In *Commonwealth v. Tarbox*, Forbes J. said: "In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur, whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of *Commonwealth v. Holmes*, 17 Massachusetts, 396, furnishes both an authority and a precedent for this form of pleading. In the present case, the indictment sets out the printed paper according to its purport and effect, and not in *hæc verba*, or according to its tenor, or by words importing an exact transcript. The mode of pleading adopted cannot be sustained, and the indictment being insufficient, judgment is arrested."

In an indictment for a larceny of written instruments, made the subject of larceny by statute, it is sufficient to give a brief legal description of the instrument. Thus an indictment for larceny, alleging that the defendant stole "one bank-note of the value of ten dollars, of the property of one C. D.," is sufficient without a more particular description of the note. *Commonwealth v. Richards*, 1 Massachusetts, 337. 2 East P. C. 602, 777. So an indictment for selling lottery tickets need not set out the tickets sold. *The People v. Taylor*, 3 Denio, 99. In this case Bronson C. J. said: "In the cases to which we have been referred where it is necessary to set out the tenor of the instrument, as in indictments for forgery and counterfeiting, for libels and threatening letters, the writing constitutes the gist of the offence. But it is not so where the defendant is charged with the sale of a lottery ticket. That is more like larceny of a written instrument, where the indictment need not set forth either the tenor or purport of the writing. A general description is sufficient. And besides, a ticket need not be in the form of a written contract or engagement. It may be any sign, symbol, or memorandum of the holder's interest in the lottery."

In Massachusetts St. 1864, ch. 250, § 1, enacts that "No variance between any matter, in writing or in print, produced in evidence on the trial of any criminal cause, and the recital or setting forth thereof in the complaint, indictment or other criminal process whereon trial is had, shall be deemed material,

provided that the identity of the instrument is evident and the purport thereof is sufficiently described to prevent all prejudice to the defendant." In *Commonwealth v. Hall*, 97 Massachusetts, 570, the indictment alleged that the defendant had in his possession with intent to utter, knowing the same to be false, "a counterfeit bank-bill, of the tenor following, to wit," and then set forth a bill purporting to be issued by a national bank, promising to pay a certain sum to the bearer on demand, and dated, and signed by the president and cashier; and also set forth, as if a part of the instrument, a certificate purporting to be signed by the register of the treasury and by "P. E. Spinner, Treasurer of the United States," that "this note is secured by bonds of the United States deposited with the United States Treasurer at Washington." At the trial, the paper offered in proof of this allegation was of that tenor, except that the certificate thereon bore the signature of "F. E. Spinner, Treasurer of the United States;" and it appeared in evidence that the name of the treasurer of the United States was *Francis E. Spinner*. Held, that the variance was rendered immaterial by the first section of the St. 1864, ch. 250, § 1, of the constitutionality of which the court "entertained no doubt."

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### BERRIAN v. THE STATE.<sup>1</sup>

October Term 1849.

#### *Indictment — Figures.*

It is error in an indictment to express numbers or dates by Arabic figures or Roman numerals; they must be written in words at length, except when the indictment, as in forgery, professes to set forth the exact tenor or a fac simile of any instrument.

THIS cause was argued at October term 1849, before the Chief Justice, and Nevius and Carpenter, Justices, by *J. Warren Scott*, for the plaintiff in error, and by the *Attorney-General* and *Elmendorf*, for the State.

*Scott*, for the plaintiff in error.

A part of this indictment is in Arabic figures, and there is no innuendo to explain their meaning. In olden times, pleadings, court rolls, and all proceedings in courts of law were engrossed in Norman French. The statute 36 Edw. III. required all pleadings and law proceedings to be entered and enrolled in Latin. The statutes 4 Geo. II. ch. 26, and 6 Geo. II. ch. 14, directed that they should be in English. Our statute is a condensation of these two

<sup>1</sup> 2 Zabriskie, 1, 679.



acts of Parliament, and it is done by a master's hand. It enacts that all proceedings whatsoever, in every court of law in this State, shall be written in words at length in the English language, and in no other tongue or language, and not abbreviated, except by such abbreviations as are commonly used in the English language; provided nevertheless, that it shall be lawful to express numbers by figures in like manner as hath heretofore, or is now commonly used in the said courts respectively.

During the time in which the statute 36 Edw. III. was in force, a period of nearly three hundred and seventy years, there is not one case to be found justifying the use of Arabic figures in law proceedings. All the old reports repudiate them in most decisive terms. I do not find either authority or dictum allowing their use. Nor can I find any such authority, or even dictum, from Westminster Hall since the statutes of Geo. II. on the contrary, numerous decisions condemn them in peremptory terms.

All the elementary writers, modern as well as ancient, concur in laying it down as a principle, that indictments must be written out in words at length; that no abbreviations are admissible; that figures cannot be allowed in indictments, but that all numbers must be expressed in words at length. To this general rule there is an exception, and that exception embraces two cases: first the case of forgery, and the second the case of threatening letters. In these two cases a fac simile of the instrument may be given. And they assign a reason for it. I refer the court to 1 Hale, P. C. 170; Andrews, 146; Burn Justice, tit. Indictment; Crown C. C. (ed. Ryland) 51; Crown C. C. (1st Amer. ed.) 33; Hawkins P. C. bk. 2, ch. 25, § 129; 1 Chitty, Crim. Law, 176.

In New Jersey it never was the use or custom to express numbers by figures in indictments. The courts of our State never did adopt a custom or practice so slovenly or insecure. Our earliest reports condemn the use of figures in law proceedings, even in civil cases. "No common usage or custom has sanctioned the use of figures in this State; no such custom has ever obtained. From the earliest times to the present it would have been error," says C. J. Kirkpatrick in the case of *Cole v. Petty*, 1 Pennington, 43, 44. In an early case, C. J. Kinsey makes use of similar language. He expressed his disapprobation in pointed terms, censured the pleader for his negligence, and quashed the indictment.

The indictment under review professes to set forth the substance and effect of the oath. It says that Berrian swore, among other things, to the substance and effect following. The oath set forth is therefore not a copy, nor can it be immaterial, for it is charged to be the substance and effect. It is a contradiction in terms to say that the substance is immaterial.

GREEN C. J. It is objected that a part of the indictment is in figures, and not in words at length. By an inspection of the record, it appears that the day of the month and the year, in which the affidavit upon which the perjury is assigned, is therein recited to have been taken, and the day of the month and year upon which, in that affidavit, the larceny is charged to have been committed, are in figures.

It is laid down by Sir Matthew Hale, that figures to express numbers are not allowable in indictments, though sometimes literal numbers be allowable in returns; but in indictments, the numbers, whether cardinal or ordinal, must be expressed in Latin. 1 Hale P. C. 170.

The modern elementary writers state the rule to be, that no part of the indictment must be in figures, and therefore numbers and dates must be expressed in words at length. The only exception to this rule is where a fac simile of a written instrument is to be set out, as in the case of forgery, in which case it must be set out in the indictment in words and figures, as in the original itself. Archbold Crim. Pl. 25. 1 Chitty Crim. Law, 176. 2 Burn Just. 500, Indictment, VII.

By the statute 13 Edw. III. ch. 15 (1390), it is enacted: "That all pleas which shall be pleaded in any courts whatever shall be entered and enrolled in Latin. This statute was in force when Hale wrote his treatise, and continued in operation down to the fourth year of Geo. II. (1731). 3 Bl. Comm. 322.

The earliest case touching the use of figures in legal proceedings, which I find reported while this statute remained in force, was a civil suit in the 13 Car. II. The action was assumpsit. Upon writ of error, after verdict, it was assigned for error, that the year (1642) in which the promise was alleged in the declaration was in figures. Jones J. was of opinion that, being in an inferior court, it was helped by the statute of jeofails. But the court said, the time is necessary, and ought to be in Latin, according to the

statute, and being in figures is insensible. And judgment was reversed. *Bushel v. Bland*, 1 Keble, 19, pl. 55. The same case is reported as *Ducket v. Bland*, 1 Siderfin, 40, pl. 6. 13 Viner Ab. 210, Figures.

In the 22 Car. II. it was moved, in the King's Bench, to quash an indictment, because the year in the caption was in figures; but the objection was avoided by the year of the reign being also stated. Hale C. J. said that was enough. 1 Modern, 78, pl. 40. In *Hobson v. Heywood*, 23 Car. II. Style, 88, the plaintiff in error, in an action of debt for rent, assigned for error, that the sum demanded for rent was in figures, and not in words. The court held that the error was material, and reversed the judgment.

In *Hawkins v. Mills*, 26 Car. II. in an action of debt, the error assigned was, that, in the award of the venire facias, the sheriff was commanded to summon "XII men," the number twelve being in Roman letters. The objection was not allowed, being in text, as used in King's Bench, and not in figures, but if it had been 12 in figures it would have been error. 2 Levinz, 102; 3 Keble, 301. Anonymous, 1 Ventris, 256. 13 Viner Ab. 210, Figures, 4.

It is worthy of notice that this error was assigned upon the defect of the record touching the number of jurors, in regard to which there could have been no mistake, the number being fixed by law, and in the modern practice being entirely omitted in the award of the venire. 3 Bl. Comm. Appendix, § 4. 2 Lilly Ent. 350, 397.

In *Hebbert v. Corsthorp*, 5 W. & M. (Skinner, 409) in assumpsit for work and labor, the exception was, the sum in the writ of inquiry was in figures. Sed non allocatur, for they were (XII) Latin figures, which is well enough: otherwise if they had been (12) English figures.

In *Rex v. Phillips*, 1 Strange, 261 (6 Geo. I.) a coroner's inquisition was quashed because the year in the caption was in common figures, whereas it ought to have been in words at length, or at least in Roman numerals.

If the caption of an indictment set forth the style of the day or year in any figures but Roman, it is insufficient. *Hawkins P. C.* bk. 2, ch. 125. § 129. 2 Keble, 128, pl. 83. Bacon Ab. Indictment, I.

In the Law of Errors (ed. 1703) there is an assignment of

error in a civil suit, because in the record the sums are written in figures, when they ought to have been written at large.

In 1 Instructor Clericalis (ed. 1714) 14, it is said: "Tis reckoned more clerklike to write all sums and figures till past five at length, but after five in numerical figures;" but this is meant as to precedents, tests of writs, and such things as are not of record, for there all sums ought to be at length in words.

The authorities which have been cited are all drawn from the period when the statute of Edward remained in force. That statute, it will be recollected, simply required the proceedings of courts to be entered and recorded in Latin; and it has been suggested, as a ground for the distinction between the Roman numerals and the Arabic figures, that the former are Latin, which the latter are not. It will be recollected, however, that during this period legal proceedings were all entered in court-hand, with numerous abbreviations, quite as unintelligible to the uninitiated as the Roman numerals themselves.

The statute 4 Geo. II. ch. 26, enacts, that from and after the 25th of March 1733, all writs, pleadings, records, and proceedings in courts of justice shall be in the English tongue, and shall be written in a common legible hand and character, and not in court-hand and in words at length, and not abbreviated.

The statute 6 Geo. II. ch. 14, enacts that all writs, pleadings, records, and proceedings in courts of justice may be written or printed in a common legible hand and character, and with the like way of writing or printing, and with the like manner of expressing numbers by figures, as have been heretofore, or are now commonly used in the said courts respectively, and with such abbreviations as are now commonly used in the English language. 6 Statutes at Large, 65, 120.

In *The King v. Haddock* (11 Geo. II.) the indictment was for a nuisance, by putting and placing on the soil of the river Thames, on the first day of August 1732, 200 loads of brick. To this indictment there was a demurrer on several grounds, one of which was, that the year when the offence was committed, and also the quantities of brick, were expressed in figures. Lee C. J. said, there was great weight in the objection, and relied especially upon the authority of Lord Hale, that figures ought not to be used in indictments.

[Page J. said that in civil actions figures are now good, because

literal ones were therein used before the late acts; but that in indictments they ought not to be inserted, because it was not usual before these acts, therein to express numbers in figures.

Chapple J. said, the objection is a very strong one, and the cases are express for the purpose. It is very difficult to maintain, upon the late acts, that figures may be used in indictments, it not being usual to use them in such cases before.

Probyn J. said, no other figures but such as are capital were ever used in the bodies of indictments, and these were never allowed *but only in immaterial parts*; but in this case a very material part is expressed in figures: now these are not aided by the English acts, because they leave the matter as it was before.]

The court took time to advise, and no final opinion was ever given, there being a new indictment brought by the prosecutor. Andrews, 137; 2 Sessions Cases, 315.

Upon a careful examination of the English cases, except the language of Probyn, in *The King v. Haddock*, I find no adjudication, nor even a dictum, either before or after the statute of Geo. II. which countenances the idea that figures, either Roman or Arabic, may be used in an indictment. The more recent elementary writers (as we have seen) adopt the doctrine of Lord Hale, and lay down the rule explicitly, that figures cannot be used in an indictment, except when the fac simile of a written instrument is to be set out.

The courts at Westminster, indeed, have carried the principle of requiring the proceedings in courts of law to be in words at length, so far as to hold it a fatal objection to civil process that the year in the notice to appear was in figures, and not in words at length. *Pinero v. Hudson*, 1 Maule & Selwyn, 119. *Sutherland v. Tubbs*, 1 Chitty Rep. 320 note. *Grojan v. Lee*, 5 Taunton, 651. *Williams v. Jay*, 5 Taunton, 652 note.

It was, however, subsequently resolved that such notice was good though the year were in figures. *Eyre v. Walsh*, 6 Taunton, 333.

Process had previously been held good even when the year was erroneously stated, or altogether omitted in the notice. 1 Taunton, 424. 2 Strange, 1232. Barnes, 425.

I have been led to this review of the authorities, from the fact that in two or three recent American cases it has been held that Arabic characters will not vitiate an indictment. *The State v. Raiford*, 7 Porter, 101. *The State v. Hodgeden*, 3 Vermont, 481. *Peck*, 165,

cited in 2 Hale P. C. (ed. 1847) 170, note 2; 2 Bouvier's Law Dictionary, Figures. In *The State v. Raiford*, the court said that it was more proper to write the day, year &c. than to insert Arabic characters; but that the contrary practice has prevailed so long that it would be unwise to disturb it. The decision of the court is based upon established practice. Such, doubtless, is the practice of the State where that decision was made, but I have been unable to ascertain the existence of any such practice in the courts at Westminster; and in this State both practice and authority are the other way.

Our statute respecting amendments and jeofails adopts the material provisions of the statutes of Geo. II. in respect to civil suits, but provides that no part of the act, except that which directs proceedings to be in English, shall extend to indictments or criminal proceedings. Rev. Sts. 991, § 17, 19.

In *Cole v. Petty*, 1 Pennington, at p. 61, Kirkpatrick C. J. said, it is certain that in courts of record we do not enter judgments in figures. No such custom has ever obtained from the earliest times to the present; it would have been error. And, indeed, as the sum for which judgment is entered, is the very essence of the whole, it would seem to be absurd that all the rest of the proceedings should, of necessity, be entered in words written at length, and that this only should be entered in figures.

Judgments, even in the courts for the trial of small causes, cannot be entered in figures. Pennington, 61, 86, 110, 413.

In *Ross v. Ward*, 1 Harrison, 23, Hornblower C. J. manifested a strong disposition to extend the principle even to the process of the justices' courts. He said: "The process of a court requiring the personal appearance of a party, ought to be in words at length, especially as to the time he is requested to appear, and the sum demanded of him."

These opinions exhibit clearly the view which our courts have taken against the principle and practice of using figures in civil proceedings.

In criminal proceedings, and especially in indictments, the objection to the use of figures is more obvious and cogent, and we believe they are universally (except where a fac simile is necessary) written in words at length. To this cause, and to the general judgment of the profession, that the use of figures is fatal in an indictment, may be attributed the entire absence of all judicial authority directly upon the point.

Indeed, upon the argument, it seemed to be conceded that ordinarily the use of figures in an indictment is fatal, but it was insisted that the present case is not within the principle. It remains to be seen whether the use of figures in the indictment now under consideration can be justified.

It is said, in vindication of the present indictment, that perjury is assigned upon a written affidavit, and that that part of the indictment where the figures occur, is but a transcript of the affidavit upon which the perjury is assigned. When perjury is assigned upon a written instrument, the pleader may doubtless set out the tenor of the affidavit by words and figures in the indictment. But how does it appear that that was done in the present instance?

It does not purport, upon the face of the indictment, to be a copy. It is averred to be set out not in words and figures, or according to its tenor, but according to its substance and effect. This averment cannot be rejected as surplusage. As the matter sworn to, as stated in the indictment, is most manifestly not a literal copy of the affidavit, but a mere statement of its substance and effect. It cannot, therefore, be justified upon the ground that it is a fac simile of a written instrument. The indictment charges that the defendant did say, depose, swear, and make affidavit in writing, among other things, in substance and to the effect following, that is to say:—

*State of New Jersey, Middlesex County ss.* Be it remembered, that on the 3d day of August 1846, John B. Berrian (the said John B. Berrian meaning), of the township of South Brunswick in the County of Middlesex, in his proper person, comes before me, Peter P. Mesuroll (the said Peter P. Mesuroll, Esq. meaning), one of the justices of the peace in and for said county (the said county of Middlesex meaning), and upon his oath maketh complaint, that," &c.

Now it is very manifest that all this is no part of the matter sworn to by the defendant. It is but the mere title of the affidavit, a statement of the name and residence of the deponent, the name and office of the magistrate, and of the time of taking the oath. Though composing technically a part of the written affidavit, it is no part of the matter upon which the perjury is assigned. It might all have been very properly and very advantageously omitted by the pleader. But having been incorporated in the indictment, as a part of the description of the offence, it becomes material, and must be supported by proof.

Nor is the objection obviated by the fact, that, in a previous part

of the indictment, the day upon which the affidavit was taken, is stated in words at length. The precise day upon which the crime is charged to have been committed, is not material; and had the title of the affidavit been entirely omitted, the indictment would have been supported by the production of the affidavit, though it had borne date upon another day. But, as the indictment is now drawn, if the affidavit had borne date upon any other day than the third of September, it would have been inadmissible in evidence, and solely on the ground of the misdescription of the affidavit. It cannot, therefore, be rejected as surplusage. Upon this point, I am of opinion, that the judgment below must be reversed.

This conclusion renders it unnecessary that any opinion should be expressed upon the other errors assigned.

CARPENTER J. concurred.

NEVIUS J. I concur in the opinion expressed by the Chief Justice on all the errors assigned, except that which relates to the use of figures in the indictment; and whilst I assent to the principle maintained by him on this point, I cannot agree with him in its application in this case.

By the seventeenth section of the act respecting amendments and jeofails, passed in 1794, all proceedings in every court of law and equity in this State are "required to be in the English tongue and language, and in no other tongue or language, and written or printed in good legible hand, and not abbreviated except such abbreviations as are commonly used in the English language; Provided, that it shall be lawful to express numbers by figures, in like manner as it hath been heretofore, and is now commonly used in said courts."

This provision, by the nineteenth section of the same act, is expressly extended to indictments. The first inquiry then is, were figures commonly used to express numbers and dates in indictments before and at the time of the passing of this statute? Before the Revolution, and the adoption of our Constitution in 1776, the practice was to express dates and numbers in words at length, and not in figures, and this practice seems confirmed by numerous judicial decisions, whether by regulation of the common law, or by usage or custom, or statutory provision, is not essential now to determine. In Hale P. C. vol. 2, 170, it is asserted, "that figures to express numbers, are not allowable in indictments;" and in a case reported by Andrews, p. 146, the same doctrine is held, and in which the court cite Style, 88; 1 Siderfin, 40, and 1 Keble, 19; and this doctrine is held both by Chitty and Archbold, in their



elaborate and valuable works on Criminal Law, with the qualification, however, that figures in an immaterial part of an indictment will not vitiate it, and that they may be used where a copy of an instrument is attempted to be set forth. This was the law and practice in New Jersey when the Constitution was adopted, which declared that so much of the common and statute law of England as had been in use here should remain in force; and it continued in force till the passing of the act above mentioned. The statute, therefore, made no change, and it was so held in *Cole v. Petty*, 1 Pennington, 60, and in other cases after that time. In some of the States this rule has been relaxed without the aid of a statute. In *State v. Hodgden*, 3 Vermont, 431, the court say, that figures are a part of the English language, and are admissible in indictments; and this is approved by the court in *Kelly v. The State*, 3 Smedes & Marshall, 518. In a late case in Connecticut, *Rawson v. The State*, reported in *The Law Reporter*, vol. 1, n. s. p. 113; 19 Connecticut, 292, it is said that the use of figures there is conformable to common practice, and is sufficiently precise and certain; and the chief justice in that case remarks, that in England, where most felonies were punished with death, the strictness of their practice in this respect was in *favorem vitæ*, whilst in prosecutions for misdemeanors here it would be in *favorem criminis*. A like decision may be found in 7 Porter, 101.

Whatever force there may be in the reasons assigned for the decisions in the cases above cited, and in the States where they were first made, and under the circumstances under which they were rendered, I am unwilling to change the practice made by judicial decision. The old rule has been well known and understood by public prosecutors in this State, and has been uniformly practised; and I deem it safest and best to adhere to it, with the exceptions above named, until the legislature, in their profound wisdom, shall see fit to alter it. See *Johnson v. The State*, 2 Dutcher, 313. It has been very often decided by this court, that judgments of inferior courts entered in figures, are erroneous, and in violation of the act, and for that cause have been reversed; and it would be grossly inconsistent to require a less particularity in criminal prosecutions. I think the rule a safe one, and am unwilling to depart from it.

But it still remains to inquire, whether the rule contended for is applicable to this case, or whether the case is within the exceptions above mentioned.

The indictment charges that the defendant, wickedly, &c. con-

triving and unjustly intending to aggrieve one J. N. J. &c. on the third day of August in the year of our Lord one thousand eight hundred and forty-six, came before one M., then and yet being one of the justices, &c. then and there and before the said justice, was sworn and took his corporate oath, &c. and then and there falsely, &c. did say, depose, swear and make affidavit in writing, among other things, in substance and to the effect following, that is to say: "State of New Jersey, Middlesex County ss. Be it remembered, that on the 3d day of August 1846, the said J. B. B. (the said J. B. B. meaning) of, &c. in his proper person comes before me, M. (the said M. meaning one of the justices, &c. in and for the said county (the said county of M. meaning), and upon his oath maketh complaint, that on the 3d day of August, A. D. 1846 (the said third day of August in the year of our Lord eighteen hundred and forty-six meaning), he, this deponent (the said J. B. B. meaning), had one fanning mill stolen from his barn (the barn of the said J. B. B. meaning), at &c. of the value, &c. and that the said fanning mill had been taken, stolen and carried away from out the barn of him, the said J. B. B.; and that he, the said J. B. B., had just cause to suspect, and did suspect, that the said mill was then concealed in the barn of the said J. N. J., as by the said affidavit now filed, &c. more fully appears."

This is as much of the indictment as is necessary to recite, in order to exhibit fairly the objection urged. The objection is, that in the caption, or introductory part of the affidavit, which shows where and when, and by what authority it was taken; the day of the month and the year is expressed in figures. I think two answers may be given to this objection: 1st. That these figures are used in an immaterial part of the indictment; and 2d, that the pleader manifestly intended to insert a copy of the affidavit in the bill.

As to the first of these answers, if, as is intended, the pleader meant to set forth only the substance of the affidavit, that part of it, usually termed the caption, is immaterial and unimportant, and may be rejected as surplusage. The time when the defendant went before the magistrate and made the affidavit, had already been set forth in words at length, and the time when the mill is alleged to have been stolen, is also by innuendo, expressed in words at length. The offence, therefore, is sufficiently charged without any reference to this caption at all, and if upon the trial, there was found a variance in the date of the justice's memorandum, I apprehend it would not have been fatal. Time here is not

the essence of the offence, and if untruly stated in any part of the indictment, it will not vitiate it. If the affidavit set forth in the indictment, be the same upon which the perjury is assigned, it matters not whether the time when it was taken be truly stated in the caption or not; nor does it matter whether, in reciting the substance and effect of the caption, a different time should be mentioned from that which is expressed in such caption.

But the other answer, I think, is equally conclusive, that this affidavit and caption was intended to be set forth literally as written down by the magistrate, although the pleader professes to set it out in substance and effect only. If the affidavit is recited in its very words, *ex vi termini*, it must be in its very substance and effect. We have a right to judge, from the language of the indictment, whether the affidavit is literally or only substantially set forth, or intended to be set forth. The language here is in the present tense, and precisely adapted to a recital in the very words: "Be it remembered, that on this 3d day of August 1846 comes the said J. B. B. and upon his oath makes complaint." Now although there are words in the subsequent part of the affidavit in the past tense, as "that he had a mill stolen," "that it had been stolen out of his barn," that he had reason to suspect, and did suspect," it by no means appears that this is not the precise language in which the justice wrote the affidavit. And after trial, where this written paper must have been produced, and, for aught that appears, without exception, I think it will be going too far to say that it is not literally set forth in the indictment; and if so, then it is substantially set forth, and the use of figures does not vitiate the indictment. I cannot, for this cause, concur in the reversal of this judgment.

*Judgment reversed.*

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THE STATE *v.* BERRIAN.<sup>1</sup>

July Term 1850.

*Indictment — Figures.*

THIS was a writ of error brought by the State to revise the judgment of the Supreme Court reversing the judgment of the

<sup>1</sup> 2 Zabriskie, 679.

Middlesex Oyer and Terminer. The case is stated in full, and the arguments of counsel given in the report of the cause in the Supreme Court.

No written opinions were delivered in the Court of Errors, by whom the judgment of the Supreme Court was affirmed, and the judgment of the Oyer and Terminer was reversed; nor does the vote by which it was reversed appear by the minutes of the court.

The president of the court (Chancellor Halsted) has furnished the reporter with the following memoranda from an indorsement on his notes.

The court resolved unanimously that, as a general rule, the use of figures in an indictment was illegal.

The court resolved, Judges Wall and Speer dissenting, that the indictment was not defective for the use of figures, as therein used.

But the court resolved, Justice Randolph dissenting, that the indictment in this case was otherwise defective, and therefore affirmed the judgment of the Supreme Court.

In America, the weight of authority seems to be contrary to the law as stated in the principal case, and perhaps the application of it, in that case, may be doubted. But at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice, have uniformly cautioned against it. See *Lazier v. The Commonwealth*, 10 Grattan, at pp. 712, 713; *Commonwealth v. Hutton*, 5 Gray, at p. 90.

In *Finch v. The State*, 6 Blackford, 533, and in *The State v. Voshall*, 4 Indiana, 589, the indictment was held to be defective, because the day of the month, and the year when the offence was alleged to have been committed, were expressed in figures. Where the indictment charged that the crime was committed "on the third day of August eighteen hundred and forty-three," it was sustained. The *State v. Lane*, 4 Iredell, 113, Ruffin C. J. said: "Another objection is, that the indictment sets forth the time thus: 'On the third day of August eighteen hundred and forty-three,' without saying 'the year of our Lord,' or even using the word 'year.' This, we think, would have been fatal at common law; and we cannot but express a regret, that there should be, needlessly, a departure from the ancient forms in a point in which conformity is so easy and contributes so much to precision, even though it be not necessary. But we are obliged by previous adjudications to hold, that under the act of 1811, Rev. Sts. ch. 35, § 12, this indictment is sufficient. Indictments in the County and Superior Courts are now placed on the same ground. In *The State v. Dickins*, 1 Haywood, 406, the time was stated in figures, and held good, because the meaning was as well known to the court as if expressed in letters, and the indictment was therefore 'intelligible,' as required in the act of 1784. So when the caption was 'Fall term 1822,' and the indictment charged the time to be 'the first day of August in the present year,' it was sustained. The *State*

*v. Haddock*, 2 Hawks, 461. It will be observed, that in neither of those cases did the indictment expressly refer to the Christian era or any other epoch; but they were, nevertheless, sustained as expressing a certain time, because the court understood them as referring to the era of our Saviour, as that is the universal reference in judicial proceedings here as well as in common usage. This indictment was found in the year 1843, and that being in fact the year of the Christian era, it is judicially intended to mean the year of that era."

In *The State v. Hodgden*, 3 Vermont, 481, in the indictment, the characters and figures used were "A. D. 1830," and they were held to be sufficient. The report of this case is open to the criticism that it does not state in what part of the indictment those letters and figures were used. In *The State v. Seamons*, 1 Iowa, 418, the offence was charged to have been committed "on the seventh day of November, A. D. 1847." This was held sufficient. See also *Winfield v. The State*, 3 Iowa, 339. In *Rawson v. The State*, 19 Connecticut, 292, the allegation was, "the 14th day of May A. D. 1847." And was held to be sufficient. Also, in *The State v. Tuller*, 34 Connecticut, 280, where the era was not specified, and the dates were in figures. In *Hall v. The State*, 3 Kelly, 18, the offence was charged to have been committed "on the twenty-second day of March in the year eighteen hundred and forty-six." It was objected that the indictment did not state the era, or period, from which the date began. The court said: "It may fairly be presumed to have been in the year of our Lord 1846, or in the year 1846 of the Christian era." See also *Engleman v. The State*, 2 Indiana, 91. In *The State v. Egan*, 10 Louisiana Annual, 698, the allegation was, "the 7th day of April in the year eighteen hundred and fifty-four," and was held to be sufficient. In *Regina v. Kimpton*, 2 Cox C. C. 296, Parke B. doubted whether, in an indictment for perjury, an averment of the materiality of a thing occurring on "Monday, the 29th of June in the year 1846" was sufficient after verdict, as the proper course is either to state the year of our Lord or the year of the monarch's reign; and he left the prisoner to his writ of error.

In several of the United States, figures and abbreviations in the caption of an indictment have been held not to vitiate. In *The State v. Gilbert*, 13 Vermont, 647, the words "Anno Domini," in the caption, were held sufficient. In Alabama an indictment was sustained on the ground of long established usage, in the caption of which, the time of its finding was stated in figures. *The State v. Raiford*, 7 Porter, 101. In *Kelly v. The State*, 3 Smedes & Marshall, 518, it was assigned for error, that "the day and year in which the court was held, and the indictment found, is stated in figures." The court held without noticing any distinction between the use of figures in the caption and in the body of an indictment, that it was sufficient. In *Barney v. The State*, 5 Yerger, 186, the indictment contained a "precedent statement," as follows: "Circuit Court, November term 1829." This was held sufficient, as the term at which the indictment was found, appeared on record by a distinct entry. The proper distinction between the use of figures and abbreviations in the caption, and in the body of an indictment, was observed. A similar decision was also made in an earlier case in the same State. *The State v. Smith, Peck*, 165.

In *The State v. Reed*, 35 Maine, 489, it was held that a *complaint* charging an offence to have been committed on the "14th day of December A. D. 1850," is valid. From the report of the case it does not appear whether or not the

magistrate had final jurisdiction. Tenney J. in delivering the opinion, said: "The use of Arabic numeral characters has been long adopted in contracts and other documents, and no want of certainty is perceived to be the result. And the nature and cause of a criminal complaint is not rendered obscure in any degree by reason of dates being in those characters. Such abbreviations as occur in the complaint, which we are considering have been for a long time used, and their meaning is as well understood as if the words which they represent were written at length. It has not been satisfactorily shown, that a complaint containing dates in numeral characters, and the abbreviations of 'A. D,' for 'the year of our Lord,' fails to be according to the law of the land. The statutes of England, which have been cited for the purpose of showing the complaint defective, are not such as are binding authority here. The acts of the 4th year of Geo. II. ch. 14, and 6 Geo. II. ch. 26, we are not satisfied have ever been adopted as a part of the common law of this country. The practice which has prevailed in this respect, it is believed, has not been uniform even in this State, and authority is not so clear as to warrant the decision that a complaint for such a cause is essentially defective, though we think it would be better for criminal pleaders to adhere to the ancient practice which has generally been adopted to frame complaints exclusively in the English language." *Commonwealth v. Hagarman*, 10 Allen, 401, 402. *Commonwealth v. Walton*, 11 Allen, 238, 240.

In Massachusetts it has been held, that a complaint in a case where the magistrate had final jurisdiction, is sufficiently certain, in which the time of the offence is expressed by the letters A. D. preceding the words expressing the year, and in which the figure "&" is used in material parts. *Commonwealth v. Clark*, 4 Cushing, 596. A complaint which states the year of the commission of the offence in figures only, without prefixing the letters "A. D." is insufficient. *Commonwealth v. McLoon*, 5 Gray, 91. The offence was alleged to have been committed "on the fifteenth day of July 1855." Merrick J.: "The figures '1855' are not accompanied by any words or letters, qualifying or expressing their meaning, or indicating the particular era to which they refer. If it should be said that, notwithstanding this omission, it is not difficult to conjecture truly what was the time intended by the pleader who drew the complaint; the answer is, that this is not enough. The rule of law must be complied with; it does not allow any thing to be left to conjecture. What was intended should have been intelligibly and unambiguously expressed. Forms and technical rules may seem sometimes to be unnecessarily strict; but it should be remembered that they were devised as a reasonable security to an individual subject or party, in his contest with the State, when arraigned upon a criminal accusation. They ought not, therefore, to be lightly disregarded or negligently relaxed. To make the allegation of time in the complaint sufficient, there should, at all events, have been words, or at least letters, which have acquired an established use in the English language, so added to or connected with the figures contained in it, as to describe or indicate with certainty the era to which it was intended that they should refer." In *Commonwealth v. Hutton*, 5 Gray, 89, the complaint, which was held to be insufficient, contained no allegation of time except "the third day of June instant," and no reference to the date of the complaint. And in *Commonwealth v. Keefe*, 7 Gray, 332, in which the date was rejected as surplusage, the complaint did not refer to it, but duly set forth the time of the commission of the offence in words at length. In *Commonwealth v. Hutton*,

5 Gray, at p. 90, Metcalf J. quoted the following language of Lord Denman: "On the first impression we always feel desirous to get over objections of this kind, if we can; but we must abide by established rules. The objection is one which we cannot avoid giving effect to. We shall thus induce more accuracy in future." *The Queen v. Bloxham*, 6 Queen's Bench, at p. 533." It has been decided that the date of the jurat may be expressed in figures. *Commonwealth v. Keefe*, 7 Gray, 332. *Commonwealth v. Hagarman*, 10 Allen, 401.

In several of the United States, this rule of pleading has been the subject of legislation. *Lazier v. The Commonwealth*, 10 Grattan, 708. *Cady v. The Commonwealth*, 10 Grattan, 776. *Hampton v. The State*, 8 Indiana, 336. *Johnson v. The State*, 2 Dutcher, 313.

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### REX v. FURNIVAL.<sup>1</sup>

Easter Term 1821.

#### *Burglary — Indictment.*

On an indictment for burglariously breaking and entering a dwelling-house, and then and there stealing goods therein, but omitting to state the intent, the prisoner may well be convicted of the burglary, if the larceny be proved, but not otherwise. But it is the better course first to charge the intent, and then to state the particular felony which has been committed.

THE prisoner was tried before Mr. Justice Park, at the Lent assizes for the county of Stafford, in the year 1821.

The indictment charged the prisoner with burglariously breaking and entering the dwelling-house of one Thomas Rogers (omitting the words "with intent to steal"), and twenty-four knives, &c. of the goods and chattels of the said Thomas Rogers, in the said dwelling-house, then and there found, feloniously and burglariously stole, took, and carried away, &c. The indictment contained only this one count.

The facts were all clearly proved, both as to the burglary and the larceny, and the prisoner was convicted.

After the learned judge had passed sentence of death upon the prisoner, a doubt occurred to him whether the omission of the words "with intent to steal" (although the indictment afterwards charged an actual stealing) would not vitiate this as an indictment for burglary. The learned judge thought it quite clear that if the larceny had been negatived by the jury (as, for instance, if the

<sup>1</sup> Russell & Ryan C. C. 445.

property had been laid in the wrong person), although a complete burglary had been proved, no sentence could have been passed upon an indictment where the burglary was not fully stated. In Starkie Crim. Pl. vol. ii. p. 414, the precedent there given of an indictment for burglary contains the words "with intent to steal."

The judge however was ultimately of opinion, from what was stated in 1 Hale P. C. 559, § 5, and the three following paragraphs, that the conviction in this case was right, although it was evident Lord Hale thought indictments for burglary ought to contain the words "with intent to steal."

The judge respited the execution of the sentence for the purpose of taking the opinion of the Judges upon this case, that there might be an uniformity of practice in preparing these indictments.

In Easter term 1821 all the Judges met and considered this case; they were of opinion that on an indictment like this, charging that the prisoner burglariously broke and entered a dwelling-house, and then and there stole goods therein, the prisoner might be well convicted of the burglary if the larceny was proved, secus, if not; but that it was better in all cases of burglary of this sort to charge the intent to steal, as well as the stealing, according to Lord Hale's advice, 1 Hale P. C. 559. The Judges held the conviction right.

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### JONES v. THE STATE.<sup>1</sup>

December Term 1840.

#### *Burglary — Indictment.*

Upon an indictment for burglariously breaking and entering a dwelling-house, and stealing goods therein, the prisoner may be convicted of the burglary, if the larceny be proved.

And in such case it is not necessary to allege an intent to steal; as proof of the larceny is sufficient evidence of the intention.

WRIT of error to reverse a judgment of the Court of Common Pleas.

<sup>1</sup> 11 New Hampshire, 269.



At the January term in the year 1839 of the Court of Common Pleas, the plaintiff in error was indicted for burglary.

The indictment set forth that the said Jones, in the night-time of the 14th day of January 1839, broke and entered the house of one Coffin, at Alton, and stole therefrom a silver watch.

Upon this indictment the prisoner was tried in the Common Pleas, convicted, and sentenced to imprisonment for life.

Afterwards, this writ of error was brought, and the following error, among others, was assigned; namely:—

That the indictment does not allege any intent with which the said Jones broke and entered the said dwelling-house.

*Gove*, Attorney-General, for the State.

*Hale*, for the prisoner, cited the following authorities: 2 Hawkins P. C. 164. 1 Raymond 2. 2 Hale P. C. 336. 6 East, 474. 2 Burrow, 1037. 5 Rep. 122. 4 Id. 42. 11 Id. 37. 2 East P. C. 474. 2 Term R. 687. 2 Hawkins P. C. 354. 1 Massachusetts, 516. 4 Carrington & Payne, 571. 10 Barnewall & Cresswell, 89. 1 Bacon Ab. 336. 1 Hawkins P. C. ch. 39, § 17.

GILCHRIST J. The prisoner is indicted for breaking and entering a dwelling-house, in the night-time, and stealing; and the only question is, whether the indictment should have alleged an intent to steal.

The further allegation of an intent to steal would not have vitiated the indictment; for we have held, in accordance with all the authorities, that the indictment may allege a breaking and entering with intent to steal and an actual stealing. *The State v. Squires*, 10 New Hampshire, 37.

But it seems to be well settled by the authorities, that in an indictment for burglary, the allegation and proof of the stealing are sufficient, without an averment of an intent to steal.

In the case of *Rex v. Furnival*, Russell & Ryan C. C. 445, the indictment charged the prisoner with burglariously breaking and entering a dwelling-house, and stealing. The burglary and the larceny were both proved, and the prisoner was found guilty. Mr. Justice Park, before whom the prisoner was tried, took the opinion of the Judges upon the question, whether the omission of the words "with intent to steal" would vitiate the indictment; and all the Judges were of opinion that upon an indictment in this form the prisoner might well be convicted of the burglary, if the stealing were proved; *secus*, if not; but that it was better to charge the

intent to steal, according to Hale's advice — 1 Hale P. C. 559; so that, if the theft be unsupported, the prisoner may still be convicted on his evil intention.

There are many cases in the books, from an examination of which it would seem that this form has been followed without exception being taken for the reason now given.

Thus in the case of *Rex v. Comer*, 1 Leach C. C. (4th ed.) 36, where the prisoner was indicted for breaking and entering and stealing, it was held by nine Judges unanimously, that where the felony was laid to constitute the burglary, and not the intention to commit the felony, the acquittal of the felony included an acquittal of the burglary also.

So in the case of *Rex v. Butterworth, Russell & Ryan* C. C. 520, it was held that upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and the stealing, and the other of the stealing only.

And it is held that where an actual stealing is charged in burglary, it must be proved, and proof of an intent to steal is not sufficient. It is necessary to ascertain with exactness the felony actually intended, and it must be laid in the indictment, and proved, agreeably to the fact. Thus where upon an indictment for burglary and larceny in stealing goods, it has appeared that there were no goods stolen, but that the burglary was with intent to steal, it has been holden that the indictment was not supported by the evidence. *The King v. Vandercomb and Abbott*, 2 East P. C. 519; 2 Leach C. C. (4th ed.) 708; ante Vol. I. p. 516.

Where the indictment charges a burglary, with intent to commit a felony, it will be supported by evidence of a felony actually committed; and it seems sufficient in all cases, where a felony has actually been committed, to allege the commission of it, as that is sufficient evidence of the intention. 1 Hale P. C. 560. 2 East P. C. 514. *Roscoe* Crim. Ev. 281.

We are therefore of opinion that the indictment is not defective.

*Judgment affirmed.*

An indictment for burglary, either at common law or under the statute, in order to be valid to support a conviction, must comprise certain essential points in addition to the ordinary requisites to an indictment, and these essential points we shall now proceed to consider. Hale has furnished us with the following precedent: *Quod J. S. 1 die Julii anno, etc. in nocte ejusdem diei vi et armis domum mansionalem A. B. felonice et burglariter fregit et intravit, ac ad tunc et ibidem unum scyphum argenteum etc. de bonis et catallis ejusdem A.*

B. in eadem domo inventis felonice et burglariter furatus fuit, cepit et asportavit; or *if no theft were actually committed, then ex intentione*<sup>1</sup> ad bona et catalla ejusdem A. B. in eadem domo existentia felonice et burglariter furandum, capiendum et asportandum, or eâ intentione ad ipsum A. B. ibidem felonice interficiendum contra pacem etc. 1 Hale P. C. 549. And upon this precedent he has the following remarks, which he divides into five distinct clauses, each of them essential to the constitution of an indictment for burglary:—

I. That it is said noctanter, in the night-time, or nocte ejusdem diei, in the night of the same day, for if it be in the daytime it is not burglary. *Lewis v. The State*, 16 Connecticut, 32. *Commonwealth v. Mark*, 4 Leigh, 658. *Thomas v. The State*, 5 Howard (Mississippi), 20. *The State v. Wilson, Coxe*, 439, 440.

II. That it be said burglariter, burglariously, for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or circumlocution, and therefore where the indictment is bargalriter, instead of burglariter, it makes no indictment for burglary, — so if it be burgentèr.

III. It must be fregit et intravit, “broke and entered,” for it is held, that breaking without entering, or entering without breaking, makes not burglary; yet (*Trin. 5 Jac. B. Regis*) an indictment quod felonice et burglariter fregit domum mansionalem, etc. was a good indictment for burglary, that the entry is sufficiently implied, even in an indictment by the words burglariter fregit, but the safest and common way is to say, fregit et intravit. *Fielding’s Case*, *Dyer*, 58, 99.

IV. It must be said domum mansionalem, the dwelling or mansion-house, where burglary is committed in a house, and not generally domum, for that is too uncertain, and at large.

V. It must be alleged that the prisoner committed a felony in the same house, or that he broke, and entered the house to the intent to commit a felony. 1 Hale P. C. 549, 550.

It is to be observed here, firstly, that Hale does not make any mention of the particular *day*, as being essential in indictments for burglary. And we find a passage in Lord Coke which accords herein with Hale. “At the 12th sessions of the peace, holden at Norwich for the county of Norfolk, anno 32 Eliz. one Syer was indicted for burglary, supposed to be committed 1 Augusti anno 31 Eliz. whereunto Syer pleaded not guilty. And upon the evidence it appeared, that the burglary was committed 1 Septemb. anno 31 Eliz. so as at the time alleged in the indictment there was no burglary done; and, it was conceived, that the very true day in the indictment was necessary to be set down in the indictment, for that the judgment doth relate to the day in the indictment, and so avoids feoffments, leases, &c. for that as it was also conceived, the feoffee, lessee, &c. when the attainder is upon a verdict, should not falsifie in the time of the felony; and thereupon the jury found Syer not guilty. And at the same sessions, Syer was again indicted for the same burglary, done 1 die Septembris anno 31 Eliz. when in truth it was done. And he that gave the charge at that sessions doubted whether upon this matter Syer might plead auter fois acquit for the same burglary (for, seeing the offender is allowed no counsell, the court

<sup>1</sup> An omission of the words, “ad tunc et ibidem,” after the allegation of the intent does not vitiate the indictment. *Commonwealth v. Doherty*, 10 Cushing, 52.

ought to do him justice, and assigne him counsell in favorem vitæ, though he demand it not, to plead any matter in law appearing to the court for his discharge); and thereupon he stayed the proceedings against him, and the assizes being at hand, he acquainted the justices of assize — Wray C. J. and Peryam J. — with this case, and with the doubts conceived thereupon, who answered him, that the like case had then been lately propounded by Peryam J. to all the justices of England; and by them three points were resolved; (1) That the Crown was not bound to set down the very day when the treason, felony, &c. was done, but the day set down in the indictment being before or after the offence done, the jury ought to finde him guilty, if the truth of the case be so; and if it be alledged before the offence done, to finde the day when it was done in rei veritate, for they are sworn ad veritatem dicendam, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment." Syer's Case, 3 Inst. 230. From the opinion of the Judges in this case it is clear, that in an indictment for burglary, it is not necessary to lay the particular day when the felony was committed, but on proof of its being committed in the night-time of some day previous to the framing of the indictment, it would be sufficient. But an indictment requires that *some precise day* should be laid, though proof of the day on which the burglary has been committed need not, as we learn from the above passage of Lord Coke, correspond therewith. And we observe that the precedent above given from Lord Hale mentions a certain day. Kelyng cites this case of Syers, upon the same point being raised in favor of Sir Henry Vane upon his trial for high treason. "Although the treason of compassing the king's death," he says, "was laid in the indictment to be 30th of May 11 Car. II.; yet upon the evidence it appeared, that Sir H. Vane, the very day the late king was murdered, did sit in council for the ordering of the forces of the nation against the king that now is, and so continued all along until a little before the king's coming in.

"It was resolved, that the day laid in the indictment was not material, and the jury are not bound to find him guilty that day, but may find the treason to be, as it was in truth, either before or after the time laid in the indictment, as it is resolved in Syer's Case, 3 Inst. 230. And accordingly in this case the jury found Sir H. Vane guilty of the treason in the indictment the 20th January, 1 Car. II. which was from the very day the late king was murdered, and so all his forfeitures relate to that time, to avoid all conveyances and settlements made by him." Kelyng, 16.

Again, upon the trial of Mr. Townley in 1746 for high treason, his counsel objected, that the overt acts, which were for levying war, were charged in the indictment to have been committed on the 10th October, and on that day only, whereas all the evidence was of overt acts committed on different days subsequent to that time; but the court overruled the objection. Foster, 8. And in a note subjoined to this case in Foster, whether by the learned judge himself or his nephew, Mr. Dodson, who published the second edition of his work, does not appear, we find "that Lord Balmerino, who had neither counsel nor witness at his trial, insisted on the same point; and the House, out of their extreme tenderness in case of life (after the Lord Chancellor had delivered his opinion clearly, that the time is not material, provided the treason be committed before the bill found), put the question to the Judges; Lord C. J. Lee delivered their

unanimous opinion, that the day is not material, provided the treason be proved to have been committed before the finding of the bill." Foster, 9. That the law is the same in cases of murder, we learn from another passage in Hale. "If A. be indicted, that the first of July 21 Car. II. he robbed or murdered B. and upon evidence it appears, that it was committed another day or year, either *after or before* the time laid in the indictment, yet this proves the issue for the king." 2 Hale P. C. 291.

The above extracts abundantly prove that it is not necessary in burglary to lay the precise day on which the offence may have been committed; and that the indictment may be good, even if, at the day laid, no burglary had actually taken place.

The precedent furnished by Lord Hale does not specify the particular hour of the night at which the burglary took place. But elsewhere he says: "Where the time of the day is material to ascertain the nature of the offence, it must be expressed in the indictment — as, in an indictment for burglary it ought to say, *tali die circa horam decimam in nocte ejusdem diei felonice et burglariter fregit*, yet by some opinions *burglariter* carries a sufficient expression, that it was done in the night-time." 2 Hale P. C. 179. *Regina v. Thompson*, 2 Cox C. C. 445. "The term *burglariously*," says Hinman J. in *Lewis v. The State*, 16 Connecticut, 32, 34, "is understood in modern professional language, to imply that the act was done in the night." And it may be remarked *obiter*, that the words *ejusdem diei* presuppose the mention of a certain day, at all events, laid in the indictment. And that the precise hour should, at all events, be mentioned, we have the authority of East, founded on a case actually decided on this point. "The indictment must also not only state the fact to have been done in the night of such a day, but it ought also to express at about what hour of the night it happened; though it does not seem necessary that the evidence should strictly correspond with the latter allegation. In *Waddington's Case* the indictment for burglary alleged the fact to have been committed in the night, but did not express at or about what hour it was done. Gould J. held the indictment insufficient as for a burglary, and directed the prisoner to be found guilty of simple larceny only. He said, 'that as the rule then established was, that a burglary could not be committed during the twilight, it was therefore necessary to specify the hour, in order that the fact might appear upon the face of the indictment to have been done between the twilight of the evening and that of the morning.'" *Waddington's Case*, 2 East P. C. 513. *The State v. G. S. 2 Tyler*, 195, 200. But see *Regina v. Thompson*, 2 Cox C. C. 377, *Patterson J.*

In Massachusetts it has been held, in the case of *Commonwealth v. Williams*, 2 Cushing, 582, that since the passing of statute 1847, ch. 13, defining "the time of night-time in criminal prosecutions," it is sufficient to allege, generally, that an offence was committed in the night-time, without designating the particular hour of the night; and by such allegation is to be understood the period of night-time as defined in that statute. In this case Dewey J. said: "The allegation in the indictment is, that the defendant broke and entered the city hall on the twelfth day of November 1847, 'in the night-time of said day.' It has been considered proper and necessary, until the statute of 1847, ch. 13, and such are the usual precedents, to state some particular hour of the night in which the burglary was alleged to have been committed. The reason for this seems to

have been, that one might, with a felonious intent, have broken and entered a building, at a time properly called, in popular language, *night-time*, and yet not have committed the crime of burglary: the time in which that offence can be committed being not so far extended as to embrace the night-time, in the ordinary use of that word, but a period when the light of day had so far disappeared, that the face of a person was not discernible by the light of the sun or twilight. But the statute just cited has defined 'night-time' for all purposes of criminal proceedings. Wherever 'night-time' is now used in an indictment, as descriptive of the time of the commission of the offence, it is to be understood of the night-time as defined by this statute. The allegation, that the breaking and entering were in that night-time, is virtually an allegation that the offence was committed during the time between one hour after sunset on one day, and one hour before sunrise on the next day." In *Commonwealth v. Lamb*, 1 Gray, 493, it was held, that an indictment on the Rev. Sts. ch. 126, § 5, which imposes a punishment on "every person who shall wilfully and maliciously burn, either in the night-time or in the daytime," any building therein mentioned, is not defective by reason of its alleging the offence to have been committed in the night-time between the hour of sunset on one day and the hour of sunrise on the next day, notwithstanding St. 1847, ch. 13; although this error in the indictment would be fatal to sustaining the indictment, as charging the burning a building in the night-time. But that is immaterial, as the punishment authorized by the statute for burning the buildings therein described, either in the day or night time, is the same.

Lastly, the allegation of time must be repeated in the averment of every distinct material fact; but after the day and year have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words "and then" (*et adtunc*), and the effect of these words is equivalent to an actual repetition of the time. 1 Starkie Crim. Pl. 2d ed. 58. 1 Hale P. C. 178. But the word copulative "and," without the addition of "then," would be insufficient. 2 Hawkins P. C. ch. 23, § 88. Cro. Eliz. 739.

II. With regard to the second essential qualification in an indictment for burglary, as above laid down by Hale, in the first place every indictment for felony must always allege the fact to have been done felonice, feloniously. 2 Hale P. C. 184. And, without the insertion of such word, an indictment for burglary would fail; nor is the word "feloniously" sufficient, unless the word "burglariously" be added. "For," as Hale says, "it is a legal word of art, without which burglary cannot be expressed with any kind of other word, or other circumlocution." 1 Hale P. C. 550; 2 East P. C. 512. In *Long's Case*, Coke, speaking of the bad Latin which should not impeach judicial writs, says: "The same law of indictments, as if in an indictment it be *præfato Reginæ* where it should be *præfata Reginæ*, or *præfata Regi* for *præfato Regi*, or the like, forasmuch as the word is Latin and significant, and although it be not true Latin, the indictment for such incongruity shall not be quashed. But if the word be not Latin, nor allowed by the law as *vocabulum artis* (or every art and science has *propria vocabula artis*), but is insensible, there if it be in a point material, it makes the indictment insufficient, as *burglaria*, *burglaritèr*, *murdum*, *felonice*, and the like, are *vocabula artis*, known to the law, and therefore if such words,

or the like, are mistaken in an indictment, so that there is in a material place a word insensible, which is not Latin, nor any word known in law, it makes the indictment vicious and insufficient, as *murdrædum*, for *murdrum*, or *burgariter* for *burglariter*, *feloniter* for *felonicè*. Long's Case, 5 Rep. 121. And how strict has been the attention paid to the word "burglariously," in indictments for burglary, will be seen from the following case.

"Richard Vaux brought appeal of burglary against Thomas Brooke, and declared that the defendant domum mansionalem prædicti Ricardi Vaux felonice et burgalitèr fregit, &c." The defendant pleaded not guilty, and by a jury of the county of Bucks, which appeared this term at the bar, he was convicted of the felony and burglary aforesaid, and the defendant's counsel moved, in arrest of judgment, that the declaration was insufficient, because the word *burgalitèr* was of no signification, but the declaration ought to be *burglariter*, or *burgulariter*, and the offence is called *burglary*, or *burgulury*, and not *burgalry*, for there wants an *l* between *g*, and *a*, and in the latter syllable *l* is inserted in lieu of *r*, and *burglariter* est vox artis, as *felonicè*, *murdravit*, *rapuit*, *excambium*, *warrantizare*, *frankalmoign*, *frank-marriage*, and several others, which cannot be expressed by any periphrasis or circumlocution; and this word *burglary* is derived from these two words, *burgh*<sup>1</sup> and *laron*, and therefore *burglary*, or *burgulury*, is sufficient, but not *burgalry*, for that wants sense; and many precedents warrants *burgulariter* to be good, but none was found to warrant *burgaliter*; and upon this exception Cur. adv. vult, till the next term; and in the mean time the plaintiff died; and that was shown to the court by the defendant's counsel as *amicus curiæ* (6 Mod. 143), and made manifest by sufficient testimony, and thereupon the court was moved, that forasmuch as for this felony and burglary he was once convicted at the suit of the party, he could never be charged with the same offence at the suit of the king, that he might be thereof discharged, and upon that the court took advice; and it was resolved, that if the declaration had been sufficient, then being convicted at the suit of the party, he should not again be impeached at the suit of the king; but it was resolved that the declaration here was insufficient, and, therefore, he was discharged." Brooke's Case, 4 Rep. 39; same case alluded to by Crompton, fol. 34.

In Massachusetts, it has been decided, that the statute definition of house-breaking has done away with the common-law requisitions of the offence, so that *burglariter* no longer makes a part of the *quo modo* of the crime. *Tully v. The Commonwealth*, 4 Metcalf, 357. "We call this decision an important one," says George Bemis, Esq. in an interesting article in *The Law Reporter*, vol. IX. p. 387, "because in connection with a class of cases which have begun to form a line of precedents in the Massachusetts courts, *Joslyn v. The Commonwealth*, 6 Metcalf, 236; *Devoe v. The Commonwealth*, 3 Metcalf, 316; *Commonwealth v. Squire*, 1 Metcalf, 258, the old landmarks are fast vanishing in the jurisprudence of that respectable Commonwealth, before the supposed efficacy of statute phraseology, — phraseology, too, which has hardly changed a whit for the last half century, and under which common-law technicalities have hitherto been deemed indispensable." See also an article by the same writer in *The Law Reporter* (N. S.) vol. VI. p. 199.

<sup>1</sup> Lambard, in his *Justice*, says it comes from "Bower," an inner chamber.

But if the word *burglariously*, in the indictment, were merely misspelt, and were idem sonans, as if it were *berglariously* instead of *burglariously*, such error would not vitiate the indictment." *Williams v. Ogle*, 2 Strange, 889. *Rex v. Shakespeare*, 10 East, 83. *Archbold Crim. Pl.* (14th ed. 181) 174.

Lord Hale complains of the strictness necessary to be observed in these technicalities of indictments. "In favor of life," he says, "great strictness has been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villany, and to the dishonor of God. And it were very fit that by some law this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy." 2 Hale P. C. 193. *Brown v. The Commonwealth*, 8 Massachusetts, at p. 65. *Commonwealth v. Bugbee*, 4 Gray, at p. 408. But it must be remembered that in Hale's time prisoners had not the benefit of the assistance of counsel in cases of felony to the extent they have now, except in high treason, and, in addition to this, that the net spread by an indictment for burglary is a very wide one, for on failure of proof of the actual burglary, a prisoner may be convicted according to the circumstances of the case, of breaking the dwelling-house and stealing therein, of stealing in the dwelling-house to the value of £5, or of a simple larceny, and that all upon one indictment.

III. With regard to the third point mentioned by Hale, the words *fregit et intravit*, — *Anglicè*, "broke and entered," are both necessary to support an indictment for burglary, for, as we have already seen, the breaking without the entry, and the entry without the breaking, are insufficient.

In the indictment under the statute 7 & 8 Geo. IV. ch. 29, § 11, the words *break out* used there must be strictly followed. "The prisoner was indicted at the Central Criminal Court February 1835, for that he, about the hour of six in the night of the 27th of January, at the parish of St. George, Bloomsbury, being in the dwelling-house of James Henry Henderson, did steal a cloak and other articles enumerated, and having committed the said felony about the said hour, feloniously and burglariously did *break to get out* of the said dwelling-house. There was a second count, which charged that the prisoner being in, and having stolen, did *break and get out*. Clarkson, for the prisoner, objected that the indictment was bad, inasmuch as the words of the statute 7 & 8 Geo. IV. ch. 29, § 11, were not followed. Vaughan J. and Patteson J. were of the same opinion, and the jury were charged that they must confine themselves to the question of whether the prisoner was guilty of the simple larceny." *Rex v. Compton*, 7 Carrington & Payne, 139.

IV. With regard to the fourth point, the word *house* would be insufficient to support an indictment for burglary. 1 Hawkins P. C. ch. 17, § 17. But Hawkins says in a subsequent part of the same section, "Staundeforde and Anderson mentioned precedents of indictments of burglary in *domo* without adding man-



sionali. However the constant course of late precedents and opinions makes it certainly very dangerous, if not an incurable fault, to omit the word *mansionalis* in an indictment of burglary in a house; and therefore, without question, it ought always to be inserted where the truth of the case will bear it." The term *mansion-house*, *domus mansionalis*, used by Hale, has grown into disuse, and has become confined in its application to houses of a larger description than common, and the word *dwelling-house* is now generally used. But the word "mansion-house" sufficiently describes a dwelling-house. *Commonwealth v. Pennoek*, 3 Sergeant & Rawle, 199.

The indictment must lay with precision whose dwelling-house it is in which the burglary has been committed, and if this be not laid correctly there can be no conviction either for burglary nor for a larceny committed in such dwelling-house, to the value of £5. "At the Old Bailey, February session 1783, the prisoner was indicted for burglary in the dwelling-house of John Snoxall, and stealing goods therein, the property of Ann Lock. It appeared that it was not the dwelling-house of Snoxall, and it was therefore held by Buller J. and Gould J. that the prisoner could not be found guilty either of the burglary or of stealing to the amount of 40s. in the dwelling-house, under the 12 Anne, ch. 7, for it is essential in both cases to state in the indictment the *name* of the person, in whose house the offences are committed." *White's Case*, 1 Leach C. C. (4th ed.) 252; 2 East P. C. 513. So in October 1785 "William Woodward was indicted for stealing in the dwelling-house of Sarah Lunns. It appeared in evidence that her name was Sarah London. Sergeant Adair, Recorder, held the variance fatal to the capital part of the indictment." *Woodward's Case*, 1 Leach C. C. 4th ed. 116 note. In Ohio, it is sufficient to lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of the dwelling. *Ducher v. The State*, 18 Ohio, 308.

In *Cole's Case*, M. 37 & 38 Eliz. B. R., "an indictment *quod shopam cujusdam Ricardi* (without adding the surname) *burglariter et felonice fregit et intravit*, it was admitted for the matter by the Court of King's Bench to be good; but doubted whether it was good on account of the omission of surname." *Cole's Case*, 1 Hale P. C. 558. The reporter however says, it was holden good. *Moor*, 466; 2 East P. C. 513. In *Moor* it is said that a blank ——— was left for the surname.

In 3 Chitty Crim. Law, 1098, it is said, "that there can be little doubt that at the present day such an omission would be considered as material." 2 Russell 47 note 4th ed. "In all cases of this description, if there be any, the slightest doubt, whether the house broken and entered should be described as the dwelling-house of A. B. or C., the pleader should obviate the difficulty by inserting counts alleging it to be the dwelling-house of A. B. and C. respectively." Archbold Crim. Pl. 290, 7th ed. The word "of" sufficiently alleges the ownership of the property. *Commonwealth v. Williams*, 2 Cushing, 582. "Belonging to one C. G." is also sufficient. *Commonwealth v. Hamilton*, 15 Gray, 480.

Burglary may be committed in a church, at common law. *Regina v. Baker*, 3 Cox C. C. 581 (1849). In this case Alderson B. said: "I take it to be settled law, that burglary may be committed in a church, at common law. I

so held lately on circuit. See *Regina v. Nicholas*, 1 Cox C. C. 218. An indictment for burglary in a church need not lay the offence as committed in a dwelling-house. "An indictment," says Hale, "*quod felonice et burglariter fregit et intravit ecclesiam parochialem de D. eâ intentione*, is a good indictment for burglary, for *ecclesia is domus mansionalis*." 1 Hale P. C. 556. But it is not necessary to say that a church is a mansion-house, for burglary in a church is a distinct burglary of itself. And Coke says: "They be burglars which break any house or church in the night, although they take away nothing." 3 Inst. 65. In the case therefore of a burglary in a church, the indictment should lay that the prisoner feloniously and burglariously broke and entered the parish church of the parish to which it belongs, with intent, &c. according to the circumstances of the case. 2 East P. C. 512. 2 Russell on Crimes, 46 note 4th ed. In some of the United States, this offence is now provided for by statute, which makes it a distinct felony to break and enter any church or chapel, and steal any chattel therein. But in a recent case Alderson B. ruled that the acts of Parliament which particularly relate to offences respecting churches, do not destroy the offence at common law. *Regina v. Baker*, 3 Cox C. C. 581.

Where an out-house having the same protection as the dwelling-house under the statute 7 & 8 Geo. IV. ch. 29, § 13, has been broken into, the offence may either be laid to have been committed in the dwelling-house, or in the building, parcel thereof. "In *Garland's Case*, the jury found specially that the prisoner broke and entered in the night-time (with intent to steal), an out-house in the possession of George Shore, and occupied by him with his dwelling-house, mentioned in the indictment, and separated therefrom by an open passage eight feet wide; and that the said out-house was not connected with the said dwelling-house by any fence including both. In Easter term, 16 Geo. III. the Judges were of opinion that there should be judgment for the prisoner, for the jury should have found it *parcel* of the dwelling-house if it were so." *Rex v. Garland*, Somerset Lent Assizes 1776, from Mr. J. Gould's MSS. 2 East P. C. 493. So also in *Dobbs's Case*, the prisoner was indicted for burglary in the stable of James Bayley, *part of his dwelling-house*. *Dobbs's Case*, 2 East P. C. 513.

The parish in which the dwelling-house or church where the burglary has been committed must be stated in the indictment, and proved as laid; the slightest variance is fatal. Purcell Crim. Pl. 64. 2 Starkie Crim. Pl. 437 note *z*. But it has been held that if it be not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named in the indictment by way of special venue. *Commonwealth v. Lamb*, 1 Gray, 493. 2 Russell on Crimes, 47. 4th ed.

The prisoner was tried and convicted before Mr. J. Bayley at the Lancaster Summer Assizes 1824, of stealing in a dwelling-house, but a doubt having occurred whether the house was sufficiently described in the indictment, the learned judge submitted the point to the consideration of the Judges. 'The indictment stated that the prisoner, on the 6th of August 5 Geo. IV. at Liverpool, in the county aforesaid, one coat, value 40s. of the goods and chattels of Daniel Jackson, in the dwelling-house of William Thomas, then and there being, then and there feloniously did steal,' &c. The doubt was, whether it should not have been stated, 'in the dwelling-house of William Thomas there situate.' Indict-

ments for burglary and arson generally contain such a statement, and so do indictments for breaking a house in the daytime, or demolishing a house. In Michaelmas term 1824, the Judges met and considered this case, and held that the indictment showed sufficiently that the house was situate at Liverpool, and that the conviction was therefore proper. *Rex v. Napper*, 1 Moody C. C. 44.

So also in the case of *Regina v. Brookes*, who was tried for burglary at the Worcester Spring Assizes 1842, before Mr. J. Patteson. "The indictment alleged that John Brookes late of Norton-juxta-Kempsey in the county of Worcester, laborer, and others (naming them) on the 4th day of January 1842, in the night of the same day, with force and arms, 'at Norton-juxta-Kempsey' aforesaid, in the county aforesaid, the dwelling-house of Thomas Hooke there situate, feloniously and burglariously did break and enter, &c. (charging a burglary in the usual form, and the stealing of certain articles therein mentioned). Whitmore, for the prisoner, submitted that this indictment as to the burglary, was bad, because the place, Norton-juxta-Kempsey, at which the offence was alleged to have been committed, was not described by some word, importing some known division of the county, such as parish, vill, chapelry, or the like. Patteson J. I think that the name of the place, Norton-juxta-Kempsey, is sufficient of itself, without calling it either a parish or a vill, or any thing of that kind." *Regina v. Brookes*, Carrington & Marshman, 544; 2 Russell on Crimes 47, 4th ed.

Where an indictment alleges a dwelling-house to be situate *at the parish aforesaid*, the parish last mentioned must be intended. "The prisoner and two others were indicted at the Taunton Spring Assizes 1832, before Mr. J. Park, for that they 'of the parish of Walcot,' in the county of Somerset, being riotously and tumultuously assembled at the parish of St. Peter and St. Paul, in the city of Bath, did then and there feloniously, and with force, begin to demolish, pull down, and destroy a certain house of John Cooper and William Bishop, 'situate at the parish aforesaid.' It appeared that the house, which the prisoners had begun to demolish, was situate in the parish of St. Peter and St. Paul; but it was objected by Rogers for the prisoners, that the parish was not properly laid, because two parishes had been previously laid, and the indictment did not allege (as it ought to have done), that the house was in the parish *last aforesaid*. He cited as an authority 1 Rolle Rep. 223. On the part of the Crown it was urged, that the objection, if of any weight, ought to have been the subject of demurrer, as it was only an ambiguity, and for this was cited *Walford v. Anthony*, 8 Bingham, 75. It was also contended that the words '*parish aforesaid*' referred to the parish of St. Peter and St. Paul, *the last antecedent*; and *Rex v. St. Mary's*, Leicester, 1 Barnewall & Alderson, 327, was cited as decisive of the point. Parke J. after consulting with Mr. J. Gaselee, stated that the indictment, in his opinion, was sufficient, but still he thought it better to reserve the point. His lordship, on a following day, said he had fully considered the point, and was of opinion, that the parish aforesaid must relate to the last-mentioned parish, and that the indictment was therefore good." *Rex v. Richards*, 1 Moody & Robinson, 177.

The prisoners were indicted for a burglary at the Old Bailey Sessions 1814, in the dwelling-house of William Alexander Frampton, in the parish of St. Catharine Cree. It appeared in evidence that a warehouse, connected and occu-

pied with the dwelling-house, was in St. Catharine Cree, but the dwelling-house itself was in the parish of St. Andrew Undershaft. The burglary was committed in the warehouse. One of the questions reserved for the opinion of the Judges was, whether the indictment properly laid the burglary to have been committed in the parish of St. Catharine Cree, but the Judges gave no opinion upon this point, having decided the case upon another ground. *Rex v. Bennett, Russell, & Ryan C. C. 289.*

Where a dwelling-house is partly in one parish and partly in another, it has been held to be correct to lay the offence as committed in that parish, in which lies the part of the house broken into.

In *Regina v. Howell*, 1 Cox C. C. 190, the prisoners were indicted for burglary at the Central Criminal Court, March 1845, before the late Recorder, upon the following indictment: "The jurors of our Sovereign lady the Queen, upon their oath present, that T. Howell, late of the parish of St. Edmund the King and Martyr in London, and within the jurisdiction of the Central Criminal Court, laborer; F. Smith, late of the same place, laborer, and R. Franklin, late of the same place, laborer, on the 10th day of January in the eighth year of the reign of our Sovereign lady Victoria, by the grace of God, &c. about the hour of ten in the night of the same day, with force and arms at the parish aforesaid, and within the jurisdiction of the said court, the dwelling-house of George Warriner, *there situate*, feloniously and burglariously did break and enter with intent the goods and chattels, in the same dwelling-house then and there being, feloniously and burglariously, to steal, take, and carry away; and *then and there* with force and arms, two rings of the value of five shillings of the goods and chattels of Felix Gatayes, in the same dwelling-house then and there being found, feloniously and burglariously did steal, take, and carry away, against the peace of our lady the Queen, &c." The house in which the burglary was committed was a tavern, of which George Warriner was the proprietor, and Felix Gatayes was a guest occupying a room in the said tavern. The outer door of the house always remained open during the day, and through this the prisoners had made their way to the room in question, which they entered by means of a skeleton key. The tavern was situated within two parishes, the boundary line which separated them, running through the room of Gatayes. The door of the house, the door of the room, and a greater portion of the room, itself were in the parish laid in the indictment; but a chest of drawers from which the rings were abstracted was in the parish of St. Michael, Cornhill.

*Payne*, on behalf of the prisoner Howell, submitted that there was a variance between the local description in the indictment and that proved. The prisoners were alleged to be of a certain parish, and this was referred to subsequently, in describing the dwelling-house as *there situate*, meaning the parish of St. Edmund the King and Martyr; but it was proved in evidence that the dwelling-house was situate in two parishes, and therefore the allegation, which was a material one, was not sustained. It was true that the part of the house broken into was in the parish laid, but the statement was not that the breaking was in the parish, but that the dwelling-house was so. He then referred to *Rex v. Bennett, Russell & Ryan C. C. 289*, where a somewhat similar point was raised, but not determined. At any rate he was entitled to ask of the prosecutor

whether they would rely on the burglary, or, relinquishing that, rest their case on the larceny of the goods.

*B. C. Robinson* for the prosecution. It is not less true that the dwelling-house of a party is in a particular parish, merely because some small portion of it is in another parish. Every part material to the present indictment is situated as laid, and this constitutes the distinction between the present case and that of *Rex v. Bennett*. There the part broken was not in the parish laid, but was assumed to be parcel of a dwelling-house situate in the alleged parish. A single dwelling, part of which is occupied by A., and another part by B., may be taken to be two, so that a burglary in B.'s portion may be alleged to be in his dwelling-house. This shows that a house is severable when occupied by two persons, and why may it not be so when occupied by one? As to the goods stolen being located in another parish, it is immaterial, since there is no necessity to allege stealing at all; breaking, with intent to steal, is the gist of the charge, and as there were other goods in the same room, which were situated in the alleged parish, it will be a question for the jury whether the intent was not to steal them, as well as those which were actually stolen. The portion of the indictment therefore which sets out the stealing, may be rejected as surplusage, as far as the burglary is concerned. But still the jury may, if they think proper, convict of the simple larceny, for local description is for such purpose unnecessary, and a stealing being alleged, the words *there situate* are superfluous, and may be struck out.

The Recorder. The common sense of the matter seems to me to be that the dwelling-house may be laid to be in the parish, where all the acts necessary to support the charge were committed, although some part of it is in another parish; but it is for you to consider whether it may not be safer to rely on the larceny alone, since, if I am wrong in my view of the point, the whole indictment will fail.

*B. C. Robinson* submitted that he was not bound to elect, and, considering that no property was found on the prisoners, though they were immediately apprehended, the jury might, perhaps, think that the larceny was not sufficiently proved. He deemed it right, therefore, that the whole case should go to the jury.

The Recorder (in summing up) said: It appears to me that the indictment is sufficient. The objection relied on is, that the word *dwelling-house* has relation to the whole house, and that as the whole house is not in the parish laid, there is therefore a variance. But whatever might have been the mode of access, or whether we take the outer door, or the door of the room itself, they are all in the alleged parish. It might have been charged that the dwelling-house was in two parishes, but I doubt whether that could have been correct, inasmuch as the part broken could only have been situated in one. It is true that the local description must be strictly proved, but I think it is here fully established by the evidence. I would, however, assuming that you believe the facts, recommend you to limit your verdict to the breaking with intent to steal, since it is clear that the stealing, if any, was in another parish. Or you may, in your discretion, omitting all reference to the burglary, limit your verdict to the mere stealing.

The jury pronounced the following verdict: "Guilty of the offence of burg-

lary, in the parish in the indictment mentioned; not guilty of stealing the goods." The Recorder respited the judgment until he should have an opportunity of consulting the Judges on the point above raised. On a subsequent day, the Recorder said that he had consulted two of the Judges on the above case, and they were of opinion that the evidence supported the indictment, and that the conviction was good. *Regina v. Howell*, 1 Cox C. C. 190.

In *Regina v. Brookes, Carrington & Marshman*, 543, the prisoners were indicted at the Worcester Spring Assizes 1842, before Mr. J. Patteson, for breaking into a warehouse. "The indictment charged that John Brookes late of the parish of St. Peter the Great, in the city of Worcester, laborer, John Attwood late of, &c. (naming all the other prisoners) the warehouse of Henry Webb and another, *there situate*, did break and enter, and one hundred knives, &c. of the goods and chattels of the said H. Webb, &c. then and there being found, then and there feloniously did steal, take, and carry away. It appeared in evidence that the parish of St. Peter the Great is partly situate in the county of Worcester and partly situate in the county of the city of Worcester. *Whitmore*, for the prisoners, submitted that the description of the parish, as laid in the indictment, was insufficient, and that the locality of the premises being material to this charge, it must be proved as laid. According to the allegation contained in this indictment, the *whole* of the parish of St. Peter was situate in the county of Worcester, but, according to the evidence, a part only of that parish was so situate. PATTESON J. I am of opinion that that is so, and the prisoners must be acquitted of the breaking into the warehouse, but they may be convicted of the larceny. Verdict, guilty of larceny. *Regina v. Brookes, Carrington & Marshman*, 543."

So also, in the case of *Rex v. Bullock*, 1 Moody C. C. 324 note, which was an indictment for breaking into a house and stealing goods, the house was laid to be in the parish of Saint Botolph, Aldgate, and it was proved that the parish was Saint Botolph *without Aldgate*. The learned judge who tried the case (Littledale J.) directed an acquittal of the capital part of the charge, but allowed a verdict of guilty of the larceny. He afterwards however doubted the propriety of the conviction, and reserved the point for the opinion of the Judges. The Judges held, that as there was no negative evidence of there not being such a parish as *Saint Botolph, Aldgate*, the conviction was right.

Where an indictment alleged that a burglary was committed "at the parish of Woolwich," and the prosecutor proved that the correct name of the parish was "Saint Mary, Woolwich," but the parish is called the parish of Woolwich in the Central Criminal Court Act (4 & 5 Wm. IV. ch. 36, § 2), it was held by Parke B. and Bosanquet J. who tried the case (November Session 1839) that as that act showed that the parish was known by the name of the parish of Woolwich, the indictment was sufficient. *Regina v. St. John*, 9 Carrington & Payne, 40. And see *Regina v. Frowen*, 4 Cox C. C. 266.

In all cases where any difficulty is likely to arise respecting the local description of the dwelling-house, different counts should be inserted in the indictment, varying it according to the circumstances.

The allegation of *place*, as of *time*, must be repeated in the averment of every distinct material fact; but after the *place* has been once stated with certainty, it is sufficient afterwards, in subsequent allegations, to refer to it by the words

“there,” or “there situate” (*ibidem* in ancient indictments), and the effect of these words is equivalent to an actual repetition of the *place*. 1 Starkie Crim. Pl. 2d ed. 58. 1 Hale P. C. 178. 2 Hawkins P. C. ch. 25, § 78. It is however usual, in modern practice, to repeat the words, “in the said dwelling-house,” or, “in the said dwelling-house then being,” and, “at the parish aforesaid, in the county aforesaid.”

An indictment for house-breaking at the Worcester Summer Assizes 1841, after charging the prisoner with breaking and entering the house in the usual form, charged that he, forty-two pieces of the current gold coin of this realm, called sovereigns, &c., in the same dwelling-house then and there being found, *then and there* feloniously did steal, take, and carry away, &c. Greaves, for the prisoner, objected that the words “then and there,” were insufficient, and there ought to have been added to them, “in the same dwelling-house,” but Coleridge J. after referring to *Regina v. Smith*, 2 Moody & Robinson, 115, where Patteson J. had held a similar objection valid, said: “I had occasion to mention that case to my brother Patteson, and he seemed to think the decision was incorrect. I think the present indictment was sufficient.” *Regina v. Andrews*, Carrington & Marshman, 121.

Where an indictment for burglary, at the Welsh Spring Circuit 1841, charged that the prisoner feloniously and burglariously, by night, the dwelling-house of one John Davies did break and enter, with intent one Alice Davies, in the said dwelling-house then being, violently, and against her will, *then and there* feloniously to ravish and carnally to know, &c. (charging burglary with violence under the statute). E. V. Williams, for the prisoner, objected that the indictment was insufficient, and that as burglary was defined to be a breaking and entering of the dwelling-house, with intent to commit a felony therein, the indictment ought to have alleged the intent to be to ravish Alice Davies *in the said dwelling-house*, and not merely then and there. Coltman J. who tried the case, said he should certainly not stop the case on this objection, but would reserve the point, if necessary, for the consideration of the Judges. The case was reserved, but the above point was not considered by the Judges, but they were all of opinion that the breaking and entering a dwelling-house, with intent to commit a rape (being the point submitted to their consideration) was not a crime which included an assault. *Regina v. Watkins*, Carrington & Marshman, 264; 2 Moody C. C. 217.

In England, since the 7 Geo. IV. ch. 64, if a burglary be committed within 500 yards of the boundary of a county, the offenders may be tried in the adjoining county. The 12th section of that statute (which repealed the 2 & 3 Ed. VI. ch. 24, § 2, whereby it was required that trial for murder should be in the county where the death happened) purporting to be for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, enacts, “that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of 500 yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.” An indictment for burglary, which had been found by the grand jury

for the county of Hereford, at the Spring Assizes 1829, alleged the burglary to have been committed "at the parish of English Brickner, in the county of Gloucester, within 500 yards of the boundary of the county of Hereford." Upon the arraignment of the prisoners at Hereford, it was objected that the indictment was bad, on the ground that the 7 Geo. IV. ch. 64, § 12, only applied to larceny and other transitory felonies, and not to felonies which were local in their nature; but the learned judge who tried the case (Parke J.) held that the indictment was good, the effect of the 7 Geo. IV. ch. 64, § 12, was to give adjoining counties concurrent jurisdiction over 1000 yards; that the words "dealt with," applied to justices of the peace, who had consequently jurisdiction over 500 yards in the adjoining county to that in which they were qualified to act; that the words "inquired of" applied to the grand jury; "tried" to the petit jury, and "determined and punished" to the courts of sessions and assizes. *Rex v. Ruck*, 2 Russell on Crimes, 49, 4th ed. from MSS. of Mr. Greaves. But see *Regina v. Mitchell*, 2 Queen's Bench, 636.

V. We have now arrived at the fifth qualification, given by Hale as essential to support an indictment for burglary. "It must be alleged that the prisoner committed a felony in the same house, or that he broke and entered the house to the intent to commit a felony." 1 Hale P. C. 550. Here there are two allegations, either of which is sufficient to support an indictment for burglary, for we may either say that the prisoner burglariously broke and entered with the intent to commit felony, or if the evidence can support the charge of felony actually committed, we may lay that the prisoner actually committed the felony without laying the intent, for the intent may be inferred from the facts of the case.

"The commission of felony," Lord Hale observes, "is sufficient evidence of the intention." 1 Hale P. C. 560. *Rex v. Locost*, Kelyng, 30. *Commonwealth v. Hope*, 22 Pickering, 1, 5.

*First.* With regard to the first allegation above mentioned by Hale, where the indictment lays the actual commission of felony, without laying the intent, the actual commission of felony must be proved. One was indicted for burglary and stealing goods, and it appeared that there were no goods stolen, but a burglary, with intent to steal, and not being so laid as it ought to have been, Lord C. J. Holt directed the prisoner to be acquitted. O. B. Oct. 1700. 2 East P. C. 514. See also the judgment of Buller J. in *Vandercomb and Abbott's Case*, 2 East P. C. 519, 520, 521. So also if an indictment for burglary charge an actual rape, evidence of an assault, with intent to ravish, will not support it.

Where an indictment for burglary charges an actual stealing of goods, the owner of such goods must be correctly named, *Jones and Bever's Case*, Kelyng, 52, although this case has been overruled upon another point. "Where the indictment was for breaking and entering, &c. the house of J. Davis, with intent to steal the goods of J. Wakelin, and there was no such person who had goods in the house; but J. Wakelin was put by mistake for J. Davis, the prisoner was entitled to an acquittal, and it was ruled that the words 'J. Wakelin' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods, and without such words the description of the offence would be incomplete." *Jenk's Case*, 2 East P. C. 514; 2 Leach C. C. 4th ed. 774. 3 Greenl. Ev. § 17.



But it appears that if the name of the goods has once been correctly stated in the indictment, an error in a subsequent part will not vitiate it. In *Regina v. Rudge*, Gloucester Spring Assizes 1841, Coleridge J. seemed clearly of opinion that an indictment for murder, which alleged an assault on Martha Sheddon, and that the prisoner, the said *Margaret* Sheddon, did strike, &c. was not therefore bad. And see *Regina v. Crespini*, 11 Queen's Bench, 913. 2 Russell on Crimes, 44, 4th ed. note by Mr. Greaves. And in *Rex v. Exminster*, 6 Adolphus & Ellis, 598, where an assignment of Elizabeth Mathews, as an apprentice to Rev. Thomas Melhuish, mentioned her subsequently as *Elizabeth Melhuish*, this error in the surname was held by Lord Denman and Littledale J., the rest of the court concurring, not to vitiate the assignment.

A bailee may have such property in goods, as to be considered the owner of them, if an indictment for burglary with intent to steal the goods, or an indictment alleging the actual stealing of them, lay the ownership in him. The *State v. Ayer*, 3 Foster, 301. The prisoner was indicted at the Central Criminal Court, November 1830, before Mr. J. Bosanquet for breaking and entering the dwelling-house of Louis Ryezor, and stealing a watch, the property of David Miers. It was proved by Mr. Miers that the house was taken by his brother-in-law Mr. Ryezor, and that the witness, who lived on his own property, carried on his business of a silversmith there, for the benefit of Mr. Ryezor and his family, but had himself no share in the profits, and no salary. He stated that he had power to dispose of any part of the stock, which was worth near 3,000*l.*, and that he might, if he pleased, take money from the till as he wanted it, but he should inform his brother-in-law that he had done so. He also stated, that he sometimes bought goods for the shop, but that sometimes his brother-in-law did so; with respect to the breaking, he stated that a pane of glass in the shop window had been cut for as much as a month before, but that there was no opening whatsoever, as every portion of the glass remained exactly in its place, and that at the time of the theft, he both saw and heard the prisoner put his hand through the glass and take the watch. Horry, for the prisoner, submitted, first, that as Mr. Miers exercised so much dominion over the stock in the shop, he ought to have been described as a partner with Ryezor; and, secondly, that as the glass of the window had been cut before, there was no breaking. Bosanquet J. said: "Upon this evidence Mr. Miers was a bailee of the stock, and, therefore, in a case of this kind, the property may be well laid in him; and with respect to the breaking, that is quite sufficient to support the present indictment. Verdict, guilty." *Regina v. Bird*, 9 Carrington & Payne, 44.

An indictment under the statute 7 & 8 Geo. IV. ch. 29, § 11, for breaking out of a dwelling-house, having committed felony therein, must, if the felony be in having stolen goods, allege the ownership of them exactly, as in an indictment for burglary at common law, and such allegation must be proved as laid. So also, an indictment under the 1 Vict. ch. 86, § 2, for burglary with violence, must state the person against whom violence has been proved, and the proof must correspond with such allegation. "The prisoners were indicted before Alderson B. at the Monmouth Spring Assizes 1838, for burglary with violence, under the 7 Wm. IV. & 1 Vict. ch. 86, § 2. The indictments charged them with having committed a burglary in the dwelling-house of Sarah Williams, and struck David James. The burglary was proved; but it appeared that the name of the

person struck was *Jones*, and not *James*. Alderson B., having conferred with Gurney B., said: "We neither of us entertain any doubt on this point. The indictment must allege both the burglary and the striking, and the proof must correspond with the indictment. Verdict, guilty of simple burglary." *Regina v. Parfitt*, 8 Carrington & Payne, 288.

In an indictment for burglary containing a charge of stabbing, cutting, or wounding, under the statute 7 Wm. IV. & 1 Vict. ch. 86, § 2, it is not necessary to state the instrument or means by which the injury has been inflicted; and such statement, if made, does not bind the prosecutor to prove the violence done by such means. *Rex v. Briggs*, 1 Moody C. C. 318. In this case, the first count of the indictment charged the prisoners, that they, on the 9th of January &c. at the parish of Hatfield &c. feloniously &c. with a certain stick and with their feet, did strike, kick and wound William Lyall upon his head, with intent to maim him, against the statute, &c. The second count stated the intent to be to disfigure, the third to disable, the fourth to do some grievous bodily harm. The jury found the prisoners guilty of wounding the prosecutor with intent to do some grievous bodily harm; but they stated that they could not tell whether the wound was caused by a blow from a stick or a kick with a shoe. Upon an objection being taken by the counsel for the prisoners, that although a wound given by a stick might be within the statute 9 Geo. IV. ch. 34, § 12, a wound given by a foot with a shoe on it was not; and that, if it was, the mode of wounding was not properly described in the indictment, which stated it to have been done with the feet only, Mr. J. Littledale thought it right to reserve the point for the consideration of the Judges. Afterwards, in Trinity term 1831, the case having been argued before all the Judges (except Patteson J.) by Cottingham for the prisoners, their lordships unanimously held, that the means by which the wound was inflicted need not have been stated; that it was mere surplusage to state them, and that the statement did not confine the Crown to the means stated, but might be rejected as surplusage; and that, whether the wound was from a blow with a stick or a kick from a shoe, the indictment was equally supported, and they therefore held the conviction right. *Rex v. Briggs*, 1 Moody C. C. at p. 322.

*Secondly.* "An indictment for burglary may allege an intent to commit felony, without alleging an actual felony committed. But in this case care must be taken that the actual felony done correspond with the felony laid, as intended to be done, otherwise the indictment will be bad." 1 Hale P. C. 561. 2 East P. C. 514. But if, in committing the felony laid in the indictment as intended to be committed, a person commit another felony, which results from or is necessarily connected with the felony intended, this will not vitiate the indictment. For, as East observes (2 East P. C. 514), "it is a general rule, that a man who commits one sort of felony, in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular offence. Yet this, it seems," he adds, "must be confined to cases where the offence intended is itself a felony;" according to the resolution in *Dobbs's Case*, 2 East P. C. 513, who was indicted for burglary in breaking and entering a stable, with intent to kill and destroy a horse. "His object being not to kill, but to prevent the horse from running, Lord C. B. Parker held, that as his

intention was not felonious, but a trespass, the death of the horse, resulting from his act, did not make his offence a burglary."

On an indictment for burglary, in the house of D. Williams, with intent to steal goods and chattels therein, it appeared that the prisoner had, in 1843, executed a mortgage in fee of freehold land to D. Williams for 600*l.*, and in 1848 he had executed another mortgage for 200*l.*, by way of further charge on the same land, to D. Williams; both deeds contained the usual provisos of redemption, and covenants for payment of principal and interest on the sums advanced. The jury found that the prisoner committed the offence with intent to steal the mortgage deeds; it was objected that the intent was not properly alleged, as, though the mortgage deeds might be the subject of statutable larceny as "valuable securities," they were not "goods and chattels;" and, upon a case reserved, the Judges assumed, from the finding of the jury, that the prisoner broke into the house with intent to steal the mortgage deeds in their uncanceled state; that finding made it unnecessary to consider whether the securities savored of the realty, or were evidence of the title to real estate, so as not to be the subject of larceny, because being subsisting securities for the payment of money, they were clearly choses in action, and, as such, were not properly described in the indictment as goods and chattels. *Regina v. Powell*, 2 Denison C. C. 403.

The same fact, as we have already seen, may be laid with different intents. "In *Thompson's Case*, the first count laid the fact to be with intent to steal the goods of J. D.; the second count laid it with intent to kill and murder him. Upon objection made, that there were two distinct capital charges in the same indictment, seven Judges (being all who were present) held the indictment good. They said, it was the same fact and evidence, only laid in different ways." *Rex v. Thompson*, 2 East P. C. 515.

It has been held by two learned Judges, that where an indictment charges a burglarious breaking and entering a dwelling-house, with intent to steal, it need not be particularly stated whose goods they are which the indictment charges the intent to steal. "The prisoner was indicted before Mr. J. Coleridge, at the Hereford Spring Assizes 1844, for burglary. The first count of the indictment charged that the prisoner, &c. the dwelling-house of one Elizabeth Bird feloniously and burglariously did break and enter, with intent the goods and chattels in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away, and then and there feloniously did steal five taps and a quantity of wine, beer, cyder, and candles of the said Elizabeth Bird. The second count was exactly similar, but charged a breaking of the dwelling-house of Elizabeth Bird and others, and laid the property stolen to be in Elizabeth Bird and others. It appeared upon the evidence that the house in question was broken into on the night of the 13th of January 1844, and the goods mentioned in the indictment stolen; and it appeared that Miss Elizabeth Bird was the sole tenant of the house, but that she and two other ladies lived in it in common, each of the three contributing an equal amount to the establishment, and that the articles which had been stolen had been purchased by Miss Bird, but that, at the end of the year, they would be paid for by the three ladies, when they divided the expenses of the establishment. It was objected by W. H. Cooke, counsel for the prisoners, that neither of the counts of the indictment

was proved, as the evidence showed that the house of Miss Bird was broken, and the goods of the three ladies were stolen. Coleridge J. (after having conferred with Parke B.). We think that, to support the first count of this indictment, it is sufficient to prove that the prisoner broke and entered the house of Miss Bird in the night-time, with intent to steal the goods there generally; and that, by the evidence given in this case, the first count of this indictment is good." *Regina v. Clarke*, 1 Carrington & Kirwan, 421. The case of *Regina v. Lawes*, for a misdemeanor, had been decided on a similar point. The indictment charged that the prisoners, "on the 22d day of August 1842, with force and arms, at the parish of Moulsoford, &c. the dwelling-house of Richard Parsons, there situate, unlawfully did break and enter, and then and there unlawfully were in the said dwelling-house of the said Richard Parsons, with intent the goods and chattels, in the said dwelling-house, then and there being, feloniously to steal, take, and carry away, against the peace, &c. The prisoners being convicted, it was objected by Price, in arrest of judgment, that the indictment was bad, as it did not state *whose goods* the prisoner intended to steal. Erskine J. (after having conferred with Wightman J.) said: 'My brother Wightman concurs with me in thinking that the indictment is sufficient.'" *Regina v. Lawes*, 1 Carrington & Kirwan, 82.

When the indictment charges an intent to steal, it is not necessary to prove an actual stealing. "If a man," says Hale, "breaks and enters a house, with the intent to commit a felony, though he attains not that intent, but takes or steals nothing, this is burglary." 1 Hale P. C. 562. Dyer, 99. Staundeforde P. C. 30. And Coke, in his definition of burglary, expressly says, "whether his felonious purpose be executed or not." 3 Inst. 63. *Josslyn v. The Commonwealth*, 6 Metcalf, at p. 239.

It is a corollary from this proposition, that the felony intended to be committed need not be technically charged. From the very nature of the case in many instances, the crime, in its formal details, could not be given. If the alleged intent were to commit a larceny, but of what particular goods, or the property of what individual, it could not be known unless the larceny was actually committed. The crime consists in the actual breaking and entering a dwelling-house in the night-time, with intent to commit murder, rape, larceny, &c. and nothing more is necessary than such *intent*. On this indictment the prisoner is not charged or punished for the felony actually committed. *Commonwealth v. Doherty*, 10 Cushing, 52.

The decision in *Rex v. Furnival*, and the recommendation there given, to include in an indictment for burglary both an intent to commit felony and the actual commission of the felony, has been considered to settle the practice in drawing such indictments. See *Commonwealth v. Hope*, 22 Pickering, 1; *Commonwealth v. Tuck*, 20 Pickering, 356; *Josslyn v. The Commonwealth*, 6 Metcalf, 236; *Devoe v. The Commonwealth*, 3 Metcalf, 316; *Larned v. The Commonwealth*, 12 Metcalf, 240; *Crowley v. The Commonwealth*, 11 Metcalf, 575; *Kite v. The Commonwealth*, 11 Metcalf, 581; *The State v. Ayer*, 3 Foster, 301; *The State v. Moore*, 12 New Hampshire, 42; *The State v. Squires*, 11 New Hampshire, 37; *Commonwealth v. Brown*, 3 Rawle, 207. The passages in Lord Hale, which the Judges referred to, and which influenced their judgment, are extremely interesting, and are fully entitled to be transcribed entire. He says: "If the indictment be *quòd domum mansionalem J. S. felonice*

et burglaritèr fregit et intravit, et adtunc et ibidè m certain goods of J. S. felonice et burglaritèr furatus fuit cepit et asportavit, the indictment compriseth two offences, burglary and felony, and therefore he may be acquitted of the burglary, if the case be so upon the evidence, and found guilty only of the felony, and then he shall have his clergy; or he may be acquitted of the felony, but then, quære, whether he can be found guilty of the burglary, because, though where the indictment compriseth burglary and felony, the indictment is good, though it be not supposed in the indictment that it was eà intentione ad bona furandum, for the act of theft being charged at the same time, it is a sufficient evidence of his intention; but when he is acquitted of the felony, then there being nothing expressly charged in the indictment that burglaritèr fregit, etc. eà intentione ad bona, etc. felonice furandum, it stands single, as if the indictment had been of single burglary, in which case, the clause of eà intentione ad furandum, etc. had been necessary to complete a single burglary. It seems therefore necessary in such cases, not only to charge him that in nocte et burglaritèr et felonice domum, etc. fregit et intravit et bona, etc. cepit, but also further to say, eà intentione ad bona et catalla, etc. in eadem domo existentia felonice et burglaritèr furandum, and to add also the particular felony, et adtunc et ibidè m unum scyphum argenteum, etc.; and then and there one silver cup, and then, though he be acquitted of the felony, the rest of the indictment stands good against him as a single burglary, and he may be convicted of it, though acquitted of the felony. And, I think, that as the offences of burglary and felony may be found in the same indictment, so three offences may be found in the same indictment, and if he be acquitted for one, he may be convicted of the other two; and it may be of use to exclude a malefactor from his clergy. Where the offence is great, as namely for burglary and for felony, upon the statute 5 & 6 Edw. VI. ch. 9, for there may be an offence against that statute which will exclude from clergy, and yet not amount to burglary; the form of the indictment may run thus (Anglicè): That A. on the first day of February in the year of our Lord &c. in the night of the same day (he omits to mention the precise hour), with force and arms, the dwelling-house of B., &c. feloniously and burglariously did break and enter, with intent the goods and chattels of the said B., in the said dwelling-house, then being, feloniously and burglariously to steal, take, and carry away, and then and there, with force and arms, one silver cup belonging to the said B. in the said dwelling-house, then being, feloniously and burglariously did steal, take, and carry away, the said B. himself, and his wife and children and servants in the said house then being, contrary to the peace, &c.

“And note, that such an indictment need not conclude contrà formam statuti; it is sufficient that it brings the case so within the statute as to exclude clergy, and so upon the statute 23 Hen. VIII. ch. 1. By that statute, ‘All persons found guilty of robbing any church or chapel, or other holy place, or of robbing any person in his dwelling-house, the owner of the same house, his wife, children, or servants, then being within, and put in fear and dread by the same, or for robbing any person in or near the highway, and those that are found guilty of abetting, procuring, helping, or counselling thereof, are exempt from the benefit of clergy, except such as are in the order of subdeacon.’ 1 Hale P. C. 517.

“And upon this indictment, if it falls out upon the evidence that he is guilty of the burglary, but not guilty of the stealing, he may be convicted of the

burglary, and so ousted of his clergy, though he be found not guilty of the felony. Again, though he be found not guilty of the burglary, because it may be the breach of the house was in the daytime, the dweller, his wife, or servants, being in the house, yet he may be found guilty of the felony within the qualifications contained in the indictment, pursuant to the statute of 5 & 6 Edw. VI., and so ousted of his clergy; for that is not confined either to the day or night. Again, if upon the evidence it appears not to be burglary, because done in the daytime, nor yet felony so qualified as to exclude from clergy, because either there was no act of breaking, or, if there were, yet the dweller, his wife, or servants, were not in the house, he may be convicted of common larceny, and so have benefit of clergy; and so much of burglary joined with larceny." 1 Hale P. C. 559, 560, 561.

Upon this passage of Hale we may observe, first, that if the indictment charge only what he terms a single or simple burglary (for he uses both expressions), that is, a burglarious breaking and entering in the night-time, with intent to commit a felony, and any one of the requisite proofs to establish the burglary fails, as if the breach or entry, or the time or the place, or the ownership, of the dwelling-house be not made out by the evidence, but an actual felony be clearly proved, still the prisoner cannot be convicted of that felony, for it was not charged in the indictment. Any one of the ingredients of the burglary having failed, the whole indictment falls to the ground, for it only charged a single act of the prisoner, namely, a burglarious breaking and entering into the dwelling-house of A. B., with intent to commit felony, without going on to charge the actual felony committed. This would be the case, not only in a larceny, but in murder, rape, or any other felony. And the converse of the proposition is equally true; for if an indictment for burglary charge an actual commission of felony, without laying the intent, and there is no proof of the actual commission of the felony, the prisoner must be acquitted of the burglary as well as of the felony, for the indictment contains but one charge, namely, a burglarious breaking and entry into the dwelling-house, and a commission of felony therein, and one part or ingredient of the offence charged failing, the whole indictment falls to the ground. And the reasoning of Buller J. in *Vandercomb and Abbott's Case*, 2 East P. C. 520, is to the same effect. "The crime of burglary," he says, "is of two sorts: first, breaking and entering a dwelling-house in the night-time, and stealing goods there; secondly, breaking and entering a dwelling-house in the night-time with intent to commit a felony, though that felony be not committed. The circumstance of breaking and entering the dwelling-house is essential to both, but it does not of itself constitute the crime in either; for there must be a felony committed or intended, without one of which the crime of burglary does not exist, and these offences are so distinct in their nature, that evidence of one will not support an indictment for the other. For example, if a man be indicted for breaking and entering a house in the night-time, and stealing goods there, evidence that he broke and intended to steal goods, &c. or to commit any other felony, would not support the indictment." Upon this passage, East subjoins a quære, as follows: "Q. Whether the definition of the crime be not solely resolvable into the breaking, &c. with intent to commit felony, of which the actual commission is such a strong presumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of

the intent in an indictment; and therefore an indictment charging the breaking, &c. with intent to steal, is said to be supported by proof of actual stealing, though certainly not vice versa." 2 East P. C. 520.

And Mr. Greaves, in a note upon Mr. J. Buller's twofold division of the offence of burglary, remarks, "that the report of his judgment has stated the point too largely, as it seems to go to the extent of saying, that evidence of a breaking and entering, and a felony actually committed, will not support an indictment for breaking and entering, and a felony intended to be committed." 2 Russell on Crimes, 53 note. 4th ed.

We may observe that the learned judge, having laid down his proposition, namely, "that there must be a felony committed or intended, and that these offences are so distinct in their nature, that evidence of one will not support an indictment for the other," goes on to prove the first of these propositions, and apply it to the case then under consideration, but leaves the second proposition untouched. It is beyond all doubt that evidence of a felony intended will not support an indictment charging a felony committed for the reasons we have above given, but take the converse proposition, and how can the intention to commit felony be better inferred than from a felony actually committed? — as in the case of *Rex v. Locost*, Kelyng, 30. Not that a felony committed in a dwelling-house, after breach and entry, is an absolutely positive proof, amounting to certainty, and excluding all other suppositions of such breach and entry being made to commit that felony. A man might open the door of a tavern in London at night, and enter for the purpose of getting liquor, and seeing silver lying in the bar might steal it; here the commission of the larceny would be no actual proof that the entry was with intent to steal, although every other of the ingredients of burglary were fully satisfied. But as the human mind, in general, can only be interpreted by actions, the case above put could be only an exception to the rule, and an indictment charging a felony intended can in any ordinary way be only satisfactorily made out by presumptive proof, namely, by evidence of felony actually committed, and the jury must infer the cause from the consequence, instead of the consequence from the cause. On the other hand, if the indictment charge a burglarious breach and entry with intent to commit felony, and also charge the actual felony committed, then if proof fails of the burglary, as if there be no breach or no entry, or if it be not by night, or the house laid as the dwelling-house be not considered by law as such, or if the ownership of such dwelling-house be not correctly laid, still the jury may convict of the felony; or if proof fail of the felony, as, e. g., in cases of stealing, if there be no asportation, or of rape, if an assault only be proved, still the jury may convict of what Hale calls the single burglary. The statute of 5 Edw. VI. ch. 9, above referred to by Hale, was as follows: "If any person be found guilty, according to the laws of the land, of robbing any person or persons in his or their dwelling-houses, or dwelling-places, the owner or dweller, his wife, children, or servants, being within the same house or place, or in any place within the precincts thereof, such offender shall not be admitted to clergy, whether the owner or dweller, his wife or children, then or there being, shall be waking or sleeping. And also he that robs any person in any booth or tent in any fair or market, his wife, children, or servants, then being within the booth or tent, shall be excluded from clergy." 1 Hale P. C. 520. The word *robbing* here seems to mean *stealing*

from, for the statute says, the punishment shall be the same, even if the inmates are asleep.

This statute has been repealed, so far as it relates to robbing in the dwelling-house, some person being therein, by the 7 & 8 Geo. IV. ch. 27; and now by § 5 of 7 Wm. IV. & 1 Vict. ch. 86 (England and Ireland), repealing the 7 & 8 Geo. IV. ch. 29 (England), and 9 Geo. IV. ch. 45 (Ireland), it is enacted, that "whosoever shall steal any property in any dwelling-house, and shall by any menace or threat, put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas, for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

It is further to be observed upon the passages above cited from Hale, that where an indictment for burglary includes the charge of an actual felony committed, which has been subjected to a higher punishment by statute, it need not conclude "*contrà formam statuti*." A fortiori, where a statute has reduced the punishment. This rule is, however, subject to the proviso, that the felony charged in the indictment was a felony before, for if otherwise it would be necessary to conclude "contrary to the form of the statute." "If an offence," says Hale, "were felony at common law, but a special act of parliament ousts the offender of some benefit (that the common law allowed him) when certain circumstances are in the fact, though the body of such indictment must express those circumstances, according as they are prescribed in the statute, yet the indictment must not conclude '*contrà formam statuti*.'" 2 Hale P. C. 190. "But if a statute only makes an offence, or alters an offence from one crime to another, as making a bare misdemeanor a felony, the indictment for such new-made offence, or new-made felony, must conclude '*contrà formam statuti*,' or otherwise it is insufficient." 2 Hale P. C. 192. And with this passage from Hale, accords the case of Ann Davis, given in Kelyng, p. 32.

"At the jail delivery for Newgate, holden 31st August 16 Car. II., my Lord Bridgeman, myself, and my brother Wyld, recorder of London, being present, Ann Davis was indicted for murdering her male bastard child, and the indictment was not special, as the statute is, for concealing it, &c. But the indictment was—*quod infantem masculum vivum parturit, qui quidam infans masculus adtunc et ibidem vivus existens natus per legem hujus regni Angliæ spurius fuit Anglicè, 'a bastard,'*—and then goeth on in the ordinary form, that she murdered it, and doth not conclude '*contrà formam statuti*.' And it was doubted by us, whether the indictment ought not to be special; and we caused precedents to be searched, and in 2 Car. I. there was a special indictment, but after 4, 5, & 6 Car. I. all the indictments were as this is. And Mr. Lee, Clerk of the Peace for London, said that the form was altered, and made as it is now by the advice of the Judges, at that time; who agreed that that clause which is now in the indictment should be put in, and to conclude generally, *contrà pacem*, &c. and not to conclude, *contrà formam statuti*; for murder was an offence at common law, and the statute declareth, that where the child is concealed, it shall be taken to be born alive; and if it be dead, it shall be taken that it was murdered, and so the statute doth not make a new offence, but maketh a concealment to be undeniable evidence that she murdered it, and



so the court was satisfied, and went on upon the indictment." *Davis's Case*, Kelyng, 32. See also 2 Hawkins P. C. ch. 25, § 116.

It has been decided that the alterations made in the law with respect to burglary by the statute 7 Wm. IV. & 1 Vict. ch. 86, as to the hours constituting night, and as to the punishment, do not make it necessary for an indictment for burglary to conclude "*contrà formam statuti*," as the alteration with respect to the hours does not alter the offence itself, and the mere diminution of the punishment does not make that conclusion of the indictment necessary. "The prisoners were indicted before Mr. J. Erskine, at the Oxford Spring Assizes 1843, for burglary. The indictment was in the usual form, charging a burglary with intent to steal, and an actual larceny, but did not conclude '*contrà formam statuti*.' Lee, for the prisoners, submitted that the judgment ought to be arrested, because the indictment did not conclude contrary to the form of the statute. He cited Archbold Crim. Pl. 9th ed. p. 56. Secker, for the prosecution, cited *Regina v. Blea*, 8 Carrington & Payne, 735. Erskine J. I have considered the objection to this indictment, and am of opinion that the indictment is sufficient. By it the prisoners are charged with burglary, the indictment being in the old form, charging a breaking and entering a dwelling-house with intent to steal, and stealing certain goods, and the objection is, that it does not conclude '*contrà formam statuti*.' The objection was put in two ways: first, on the ground that a recent statute had altered the offence; and secondly that the punishment had been altered. On the first ground it was said, that the statute 7 Wm. IV. & 1 Vict. ch. 86, had altered the offence by substituting the hours *nine* and *six* for the old hours, and that, therefore, the '*contrà formam statuti*' became necessary. It appears to me that the offence is not altered by the statute. Burglary is the breaking and entering a dwelling-house in the night-time with intent to commit felony. The common law fixed the test of night as being, when a man's features could not be discerned. This was found to be inconvenient, and the legislature, by the statute 7 Wm. IV. & 1 Vict. ch. 86, § 4, has enacted, 'that so far as the same is essential to the offence of burglary, the night shall be considered, and is hereby declared to commence at nine P. M., and to conclude at six A. M. on the next succeeding day.' This does not at all alter the offence; and therefore on that ground the present indictment need not conclude '*contrà formam statuti*.' The other ground for the objection was, that the punishment was altered by the statute, and a passage from Mr. Archbold's work on the criminal law was cited, as showing that any alteration of the punishment made the conclusion '*contrà formam statuti*,' essential to the indictment; and if that passage had been a correct transcript of the passage in Lord Hale, it would seem that the conclusion, '*contrà formam statuti*,' was required, even when the punishment was reduced; and if that were so, the indictment for burglary, horse-stealing, larceny, and several other offences preferred within the last few years, have been all bad. However, on referring to the passage in Lord Hale, it does not appear to me to point to a case like this, as Lord Hale says: 'If an offence be at common law, and also prohibited by statute, with a corporal or other penalty, yet, it seems, the party may be indicted at common law, and then, though it conclude not '*contrà formam statuti*,' it stands as an indictment at common law, and can receive only the penalty that the common law inflicts in that case. Thus, an indictment for a riot is good, though it conclude not '*contrà*

formam statuti,' because a riot is an offence at common law, though prohibited also by acts of parliament under severer penalties. This appears to apply to a case where there had been a common-law offence, and a statute has afterwards prohibited that offence, and given a new punishment. The statute 7 Wm. IV. & 1 Vict. ch. 86, merely alters the punishment by reducing it, and the words of the statute are, 'that whosoever shall be convicted of the crime of burglary, shall be liable to be transported,' &c. And not, 'whosoever shall break and enter a dwelling-house in the night-time with intent to steal, shall be transported,' &c. I am, therefore, of opinion, that this statute, not having altered the offence, and not having prohibited the offence, but merely having reduced the punishment, it is not necessary that the indictment shall conclude 'against the form of the statute,' and the present indictment for burglary is therefore good." *Regina v. Polly*, 1 Carrington & Kirwan, 77.

In a note to the above case the reporter adds, that he had been informed by Mr. Keating, that in the case of *Regina v. Andrews*, for horse-stealing, tried before Alderson B. at the Oxford Summer Assizes 1839, he took a similar objection to the indictment, which, after time taken to consider, was overruled by the learned baron. The case of *Regina v. Blea*, referred to in *Regina v. Polly* by the counsel for the prosecution, was decided on a similar point. "The prisoner was indicted before Mr. J. Patteson at the Oxford Spring Assizes 1839, for a larceny committed after a previous conviction. The indictment, after alleging the subsequent felony, stated, that the prisoner 'at a former assize held at Oxford was convicted of felony. Greaves (*amicus curiæ*) mentioned that at the preceding Hereford sessions, an objection had been taken by J. W. Smith to a precisely similar indictment that it had not concluded '*contrà formam statuti*,' which he submitted was essential to enable the court to inflict the heavier punishment under 7 & 8 Geo. IV. ch. 28, § 11, and that the objection had been overruled by the court, who were however anxious to know if they had done right. Patteson J. I do not think there is any thing in the point. The indictment is clearly good." *Regina v. Blea*, 8 Carrington & Payne, 735.

But where the felony charged in an indictment for burglary, as either actually committed, or intended to be committed, is not a felony at common law, but is made so by statute, it is necessary that the indictment should conclude "*contrà formam statuti*." "In the case of *Rex v. Pearson*, Old Bailey, May 1831, where an indictment charged the prisoner with stealing a bank-note, upon which charge he was found guilty, judgment was afterwards respited by Littledale J. upon its having been ascertained that the counts charging a common larceny of the note did not conclude 'contrary to the form of the statute,' and the case was reserved for the consideration of the fifteen Judges, who held those counts bad on that account." *Rex v. Pearson*, 5 Carrington & Payne, 121; 1 Moody C. C. 313; 4 Carrington & Payne, 578.

Applying this case to an indictment for burglary, to break and enter a dwelling-house by night, to steal a bank-note or other security for money, would clearly not have been burglary at common law, for to constitute burglary there must have been a felony either actually committed or intended to be committed; but to steal a bank-note was no felony at common law; the statute therefore made the stealing of a bank-note a felony. And according to Hale, where the statute creates a new felony, there the indictment must conclude "*contrà formam*

statuti." Therefore an indictment for burglary charging an intent to steal a bank-note, or charging the actual stealing of it, must conclude "contrà formam statuti." Mr. Archbold however thinks that such conclusion is not necessary as to the burglary. He says: "If bank-notes or other valuable securities be stolen, conclude against the form of the statute, &c. for although this is not necessary as to the burglary, yet if that part of the charge fail, such a conclusion would be deemed to be necessary, in order to convict for the larceny." Archbold Crim. Pl. 316. 11th ed. Therefore, quære.

The passages cited at length from Hale have furnished us with the above observations relative to the care necessary to be taken in drawing indictments for burglary, both at common law and under the statute. The difficulty of the subject gave rise to the solemn recommendation of the Judges in *Furnival's Case*, following the advice of Lord Hale, that in indictments for burglary, both the intention to commit felony and the felony actually committed should be charged; nevertheless, an indictment laying the intent only, or the actual felony only, is still good, if it be made out by the evidence.

In other points, indictments for burglary follow the same rules as govern other indictments.

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### COMMONWEALTH v. GREY AND WIFE.<sup>1</sup>

October Term 1854.

#### *Indictment — Allegation in the Disjunctive — "Or" Used in the Sense of "To Wit."*

A complaint or indictment averring an unlawful sale of "spirituous or intoxicating liquor," is bad for uncertainty.

When the word "or" in a statute is used in the sense of "to wit," that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment, which adopts the words of the statute, is well framed.

A COMPLAINT, made to a justice of the peace alleged that the defendants, on the 18th of June 1854, at Canton, "without any authority or license therefor duly had and obtained according to law, did sell spirituous or intoxicating liquor to one Patrick G. White," &c. The defendants, being found guilty by the justice, appealed to the Court of Common Pleas, and there pleaded that they would not contend with the Commonwealth, and this plea was received by the court. They then moved in arrest of judgment, "because said complaint does not charge the violation of any statute of this Commonwealth, substantially in accordance with the requirement

<sup>1</sup> 2 Gray, 501.

of law." Mellen C. J. being of opinion that the question of law arising upon this motion was so doubtful as to require the decision of this court, reported the case, with the consent of the defendants.

*E. Wilkinson*, District Attorney, for the Commonwealth.

*B. Sanford*, for the defendants.

METCALF J. It is a general rule, that an indictment, information, or complaint must not charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him. 2 Hawkins P. C. ch. 25, § 58. 1 Chitty Crim. Law, 231. 1 Starkie Crim. Pl. 2d ed. 245. Thus an indictment, which averred that S. made a forcible entry into two closes of meadow *or* pasture, was held to be bad. *Spear's Case*, 2 Rolle Ab. 81. So of an information which alleged that N. sold beer *or* ale without an excise license. *The King v. North*, 6 Dowling & Ryland, 143. See also *Rex v. Morley*, 1 Younge & Jervis, 221; *Ex parte Pain*, 5 Barnewall & Cresswell, 251; *Rex v. Sadler*, 2 Chitty Rep. 519; *Davy v. Baker*, 4 Burrow, 2471.

When the word "or" in a statute is used in the sense of "to wit," that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment, which adopts the words of the statute, is well framed.<sup>1</sup> Thus it was held, in *Brown v. Commonwealth*, 8 Massachusetts 59, that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank-bills *or* promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from St. 1804, ch. 120, § 2, on which the indictment was framed, that "promissory note" was used merely as explanatory of "bank-bill," and meant the same thing. So in *The State v. Gilbert*, 13 Vermont, 647, an information was held sufficient which alleged that the defendant feloniously stole, took, and carried away a mare "of a bay *or* brown color;" the court saying that the colors named in the information were the same. And if spirituous liquor and intoxicating liquor were the same, and the word "intoxicating" had been used in St. 1852, ch. 322, as a mere explanation of the word "spirituous," the complaint in the present case would have been rightly drawn. But the two words are not synonymous. All spirituous liquor is

<sup>1</sup> *The State v. Ellis*, 4 Missouri, 474.

intoxicating; yet all intoxicating liquor is not spirituous. In common parlance, spirituous liquor means distilled liquor; and such, we believe, is its meaning in the statute. Fermented liquor, though intoxicating, is not spirituous.

A complaint or indictment on the statute should charge the defendant, either with selling spirituous liquor, or with selling intoxicating liquor, or with selling spirituous liquor *and* intoxicating liquor. The latter form is usually adopted; and it is well settled that it is a proper form, and that proof of the defendant's having sold either spirituous liquor or intoxicating liquor, as well as proof of his having sold both, will support the indictment. 1 East P. C. 402. *Angel v. Commonwealth*, 2 Virginia Cas. 231. *The State v. Price*, 6 Halsted, 203.

As the complaint against these defendants leaves it uncertain whether they are charged with having sold spirituous liquor, or intoxicating liquor which is not spirituous, we must hold it, upon the authorities above cited, to be insufficient to sustain a judgment.<sup>1</sup>

*Judgment arrested.*

## REGINA v. WATERS.<sup>2</sup>

January 30, 1849.

### *Indictment — Aider by Verdict.*

The prisoner was charged in the first count, "that she in and upon a certain infant female child born of the body of her the said S. W. and of tender age, to wit, of about the age of two days, and not named," feloniously made an assault, &c. and caused to take poison, and so murdered her.

In the second count, "that the said S. W. in and upon the said infant female child so born of the body of her the said S. W. and not named as aforesaid, &c. feloniously did make an assault, and that she, the said S. W., the said infant female child in and upon a heap of ashes, &c. wilfully, &c. did cast, &c. and did then and there leave the said infant female child, &c. in the open air, &c. exposed to the cold air, &c. of which said exposure and of the chilling thereby caused, the said infant female child then and there died, and so, &c.

*Held*, 1. That there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot.

<sup>1</sup> *The State v. Colwell*, 3 Rhode Island, 284.

<sup>2</sup> 1 Denison C. C. 356. 3 Cox C. C. 300. *Temple & Mew* C. C. 57. 2 *Carlington & Kirwan*, 866.

2. That the words "said infant female child so born of the body of her the said S. W." did not incorporate by reference the description of the child given in the first count; namely, that it was of tender age.
3. That the second count was, therefore, defective in not showing that the child was unable to take care of itself.
4. That had the act of the prisoner charged in that count been a non-feasance, the indictment would have been bad after verdict.
5. That as it was a misfeasance, and the death of the child was alleged to have been caused thereby, the defective statement in the indictment must be taken to be supplied by the verdict.

THE prisoner was tried before Baron Rolfe, at the December session of the Central Criminal Court 1848, on a charge of murder.

The first count of the indictment charged that the prisoner, "in and upon a certain infant female child, born of the body of her, the said Sarah Waters, and of tender age, to wit, of about the age of two days, and not named," feloniously and of her malice aforethought, did make an assault, and it then went on to charge that she caused the child to take poison, and so murdered her.

The second count of the indictment was as follows: And the jurors aforesaid, upon their oath aforesaid, do further present that the said Sarah Waters afterwards to wit, on the day aforesaid and in the year aforesaid, with force and arms, at the parish aforesaid in the county aforesaid, and within the jurisdiction of the said court, in and upon the said infant female child, so born of the body of her the said Sarah Waters, and not named; as aforesaid, feloniously, wilfully, and of her malice aforethought, did make an assault. And that the said Sarah Waters, with both her hands the said infant female child, in and upon a certain heap of dust and ashes, there situate and being in the open air, there feloniously, wilfully, and of her malice aforethought, did cast and throw; and that the said Sarah Waters feloniously, wilfully, and of her malice aforethought, did then and there leave the said infant female child in and upon the said heap of dust and ashes in the open air, there, as aforesaid, exposed to the cold air for a long space of time, to wit, for the space of twelve hours, by means of which said exposure<sup>1</sup> to the cold air, as aforesaid, the said infant female child became mortally chilled, benumbed, and frozen in her body, of which said exposure to the cold air, and of the mortal chilling, benumbing, and freezing in her body thereby occasioned, the said infant female

<sup>1</sup> Conf. *Regina v. Ridley*, 2 Campbell, 653, *quære*, the soundness of the dictum of Lawrence J. respecting the effect of the word "exposed."

child then and there died ; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Sarah Waters, the said infant female child, in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace, &c.

The prisoner was also charged, on the coroner's inquisition, as follows : —

That Sarah Waters, late of the parish of St. Mary, Whitechapel, in the county of Middlesex, on the 21st day of November in the year aforesaid, at the parish last aforesaid in the county aforesaid, the said female child from her body, by the providence of God, did bring forth alive ; and that the said Sarah Waters, afterwards, to wit, on the 22d day of November in the year aforesaid, at the said parish of St. George, Hanover Square in the said liberty in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, in and upon the said female child so alive, feloniously, wilfully, and of her malice aforethought, did make an assault ; and that the said Sarah Waters, the said female child so being alive, then and there did take and carry to a certain dunghole, in a certain mews there situate, and the said female child, so being alive, then and there feloniously, wilfully, and of her malice aforethought, in the said dunghole did hide, secrete, and conceal, and the said female child, so being alive, and so being hidden, secreted, and concealed, she, the said Sarah Waters, then and there feloniously, wilfully, and of her malice aforethought, did desert and leave exposed to the inclemency of the weather, and the said female child, so being alive, and so being hidden, secreted, and concealed, to nourish, sustain, and support, she, the said Sarah Waters, feloniously, wilfully, and of her malice aforethought, did then and there wholly neglect and refuse. By means of which said hiding, secreting, concealing, and deserting, and leaving exposed to the inclemency of the weather, of the said female child by the said Sarah Waters, and also, by reason of the said neglect and refusal of the said Sarah Waters, the said female child to nourish, sustain, and support, the said female child then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Sarah Waters, her the said female child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder against the peace, &c.

At the trial the jury found the prisoner guilty of manslaughter,

on the second count only of the indictment, and also on the coroner's inquisition.

A motion was made, in arrest of judgment, on the ground that the second count of the indictment stated no crime, that the age being laid under a *videlicet*, it was consistent with all which is stated in the count, that the child might be of the age of twenty years, and capable of taking care of herself, and so able to have prevented the ill effects of the exposure, which is the sole cause of death alleged.

The learned baron thought the objection good, and did not think it safe to rely on the coroner's inquisition, because the name of the child is not there stated, nor any reason given for its omission, and even in the indictment it seemed to him doubtful whether the statement that the child had not been named was sufficient to dispense with the statement of its name, for there was nothing to show that it might not have required a name by reputation.

As to the necessity of stating the name, see *Regina v. Biss*, 2 Moody C. C. 93, and *Regina v. Stroud*, 2 Moody C. C. 270.

The learned baron requested the opinion of the Judges whether either the second count of the indictment or the coroner's inquisition was sufficient to warrant a judgment for manslaughter.

On the 20th January 1849, the case was argued before LORD DENMAN C. J., PARKE B., ALDERSON B., COLTMAN J. and COLERIDGE J.

*Clerk*, for the Crown. (The arguments are fully given in the judgment. *Regina v. Willis*, 1 Denison C. C. 80, was cited. It was also said, that in the indictment the prisoner was averred to be a single woman, though this averment did not appear in the case as stated to the court.)

Afterwards on 30th January 1849, POLLOCK C. B., PARKE B., ALDERSON B., ROLFE B. and PLATT B. being present, PARKE B. after stating the facts of the case, read the following judgment.

If the second count of the indictment had charged the prisoner with causing the death of the deceased by a mere non-feasance — the neglect of her maternal duty towards her child, it would have been bad ; because the indictment ought to have stated the child to be of such an age, or in such a situation, as to be unable to take care of itself. Supposing an averment that the child was of tender years would have imported such an inability, there is no averment in this count that the child was of tender years, for the



reference in the commencement of it to the first count does not import that description. It contains no more than an averment that the child was a female, born of the prisoner's body, and not named. See opinion of Mr. Justice Patteson in *Regina v. Martin*, 6 Carrington & Payne, 217.<sup>1</sup> But this count charges the prisoner with a misfeasance, a wrongful act, in assaulting the child, and casting and throwing her on a dust heap, and if the death of the child is traced to this act, the offence of manslaughter is complete. Is it then traced to this wrongful act? It is alleged that the prisoner, having cast and thrown the deceased on the heap of dust, left her there, that is, permitted her to continue there, exposed to the cold air, by means of which exposure she was benumbed and died. The exposure therefore is charged against the prisoner, and the death is attributed to the exposure. It is not expressly averred in this case, that the child was of such tender years, or so feeble that she could not walk away and take care of herself—but that is implied, for if she had been sufficiently old, or strong to do so, the death would not have arisen from the exposure by the prisoner, but from the act of the child in not walking away and taking care of herself. Thus, it is established, that if, in an action on the case, a neglect is charged against the defendant, by reason whereof the plaintiff had sustained damage, the question, whether the plaintiff could have avoided that damage by the exercise of ordinary care, is always open on not guilty, and after verdict, it is presumed that the jury have found the fact of the neglect, and also found that the consequential damage was not caused by the want of ordinary care in the plaintiff. *Bridge v. Grand Junction Railway Company*, 3 Meeson & Welsby, 248. *Goldthorpe v. Hardman*, 13 Meeson & Welsby, 377; 14 L. J. (N. S.) Exch. 61.

In this case the jury could not have found the prisoner guilty, without actually negating the power of the child to take care of herself, and so to escape the consequences of the unlawful act of the prisoner; and consequently after verdict that fact must be implied. I think therefore that the count is good in this respect.

<sup>1</sup> There the first count described the child as E. R., an infant above the age of ten and under the age of twelve years; the second count merely described her as "the said E. R." Patteson J. held that the second count ought to have contained an express averment that the said E. R. was "then and there above the age of ten years and under the age of twelve years." See *Rex v. Cheeve*, 4 Barnewall & Cresswell, 902; 7 Dowlings & Ryland, 461, that the word "said" does not incorporate a previous description.

A doubt occurred to the learned judge, whether the description of the child as being "not named" was sufficient. "Not baptized" would not have been enough, but "not named," which means that she had acquired no name either by baptism or usage, appears to be quite sufficient.

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REGINA v. WAVERTON.<sup>1</sup>

November 21, 1851.

*Indictment — Aider by Verdict — Reference from one Count to another.*

After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count.

Any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count which merely introduced it by reference as the same subject "before mentioned."

THIS was an indictment for a nuisance in not repairing a highway, found at the Cumberland Summer Assizes 1850. It was removed by certiorari into the Queen's Bench, and was tried at the Summer Assizes for the county of Cumberland, held at Carlisle, before Mr. Justice Williams, on the 5th of August 1851. The indictment contained three counts:—

1st Count. The jurors for our lady the Queen upon their oath present, that before the day of the taking of this inquisition, to wit, on the first day of January in the thirteenth year of the reign of her present Majesty, and long before there was, and from thence hitherto hath been and still is, a certain common Queen's highway in the said county used for all the subjects of our said lady the Queen to go, return, pass, repass, ride, and labor on foot and on horseback, and with cattle, carts, and carriages, at their will and pleasure, and that a certain part of the said last-mentioned common Queen's highway, situate, lying, and being in the township or district of Waverton, otherwise called Waverton High and

<sup>1</sup> Court of Queen's Bench. 17 Queen's Bench, 562. 2 Denison C. C. 339. 5 Cox C. C. 400.

Low, in the parish of Wigton, in the county aforesaid, called the Yevens Highway, leading from and out of the highway from the village of Waverton towards the town of Mary-port in the county aforesaid, at or near a place called Parkside, on the last-mentioned highway, and extending from thence towards and unto the highway leading from Lesson Hall towards the town of Ireby in the county aforesaid, at or near Waterside in the township or district of Waverton aforesaid, and containing in length 1350 yards or thereabouts, and in breadth four yards or thereabouts, on the day and year aforesaid, and from thence continually hitherto until the day of the taking of this inquisition at the parish and in the township or district last aforesaid, in the county aforesaid, was and is yet very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said lady the Queen, during the time last aforesaid, could not go, return, pass, repass, ride, and labor with their horses, cattle, carts, and other carriages, in, through, and along the Queen's common highway aforesaid, as they ought and were wont and were accustomed to do, without great danger of their lives and the loss of their goods, to the great damage and common nuisance of all her Majesty's liege subjects, going, returning, passing, repassing, riding, laboring, in, through, and along the Queen's common highway aforesaid.

And that the inhabitants of the said township or district of Waverton, in the said parish of Wigton, in the county aforesaid, have from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, that part of the highway aforesaid, so as aforesaid being ruinous, miry, broken, and in decay, when so often as there should be occasion.

And that the said inhabitants of the said township aforesaid have not yet done the same, to the evil example of all others in like case offending, and against the peace, &c.

2d Count. That within the parish of Wigton aforesaid in the county aforesaid, from time whereof the memory of man is not to the contrary, there have been and still are divers townships or districts whereof the township or district of Waverton, otherwise called Waverton High and Low, during all the time last aforesaid hath been and still is one, and that the inhabitants of the said

township or district of Waverton, in the parish aforesaid, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways situate and being within the township or district of Waverton aforesaid as would otherwise be repairable and amendable by the inhabitants of the said parish at large, and that the said part of the same common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which but for the said prescription or usage would be repairable and amendable by the inhabitants of the said parish of Wigton at large. And that by reason of the premises, the inhabitants of the township or district of Waverton aforesaid, in the parish aforesaid, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend, the same part of the said common highway so being ruinous, deep, miry, broken, and in decay as aforesaid, when and so often as it hath been and shall be necessary, and that the said inhabitants of the said township aforesaid have not yet done the same, to the evil example of all others in like case offending, and against the peace, &c.

3d Count. The same as the second; with the exception that it averred that the inhabitants of the several and respective townships, whereof Waverton was one, situate in the parish of Wigton, were liable to repair the said highway.

Plea. Not guilty.

The jury having found the defendants not guilty on the first count, and guilty on the second and third counts, a rule nisi was obtained in the Queen's Bench on the 4th of November, to arrest the judgment on the second and third counts, on the ground that these counts were bad, in not containing any sufficient allegation that the highway, the subject of the indictment, was situated within the township or district of Waverton, or that the road was out of repair.

On the 13th November 1851, this case was argued before Lord CAMPBELL C. J., PATTESON J., COLERIDGE J. and WIGHTMAN J.

*S. Temple*, and *Pickering*, for the Crown. *Knowles Q. C.*, *Ather-ton Q. C.* and *Unthank*, for the defendants.

*Temple.* After verdict, the second and third counts are sufficient, even if the court should hold that the first count cannot be referred to. The second count says, "that the said part of the same common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which, but for the said prescription or usage, would be repairable or amendable by the inhabitants of the said parish of Wigton at large." That, after verdict, is equivalent to a direct averment that the highway was ruinous and out of repair. *Posterne v. Hanson*, 2 Wms. Saund. 60 c, and 61 m, note 9. 5th ed. *Rex v. Somerton*, 7 Barnewall & Cresswell, 463. *Rex v. Boyall*, 2 Burrow, 832. By the Statute of Jeofails, after verdict the second and third counts are sufficient. 1 Wms. Saund. 228. Secondly, the first count contains express averments that the highway was ruinous, and although the jury have found a verdict for the defendants on the first count, yet it may be referred to for the purposes of description.

PATTESON J. Is not each count a separate indictment?

*Temple.* Not for all purposes. Reference may be made in one count to a preceding one. *Regina v. Craddock*, 2 Denison C. C. 21. If the first count may be referred to, then the objections to the second and third counts are cured; the words being, the said part of the same highway being ruinous and in decay "as aforesaid." But these words may be rejected as surplusage, if the first count cannot be referred to. The defendants have been found guilty of not repairing the highway when necessary; it is impossible that the jury could have found that verdict without being satisfied that the road needed repair, and without evidence that the road was situate in the township of the defendants. In the case *Regina v. Waters*, 1 Denison C. C. 356, ante p. 152, a defective statement of an act of misfeasance was held to be supported by the verdict.

*Knowles* Q. C. for the defendants.

Every count of an indictment should charge the offence with certainty. Lord Mansfield, 1 Term R. 63, said: "It is necessary in every crime that the indictment charge it with certainty and precision, alleging all the requisites which constitute the offence."

LORD CAMPBELL C. J. Lord Mansfield was not there speaking of an indictment after verdict.

*Knowles.* There is no statement in the second or third counts that the road is out of repair. All that is said is, that this is the

part of the highway which has before been described as ruinous. The words "so being ruinous" are merely equivalent to saying "so stated to be ruinous." Although reference may be made in one count to another for some purposes, a substantial part of a charge cannot be made out by reference to a preceding count. In *Regina v. Waters*, 1 Denison C. C. 356, ante p. 152, the words "the said infant female child" were held not to import from a preceding count a description of the child as being of tender age.

COLERIDGE J. But here the words of reference are, "so being ruinous as aforesaid."

*Knowles.* These words only point out the portion of the road to which the prosecutor refers. It is necessary that there should be an averment that the road was out of repair at the time that the indictment was found by the grand jury. *Poynt's Case*, Cro. Jac. 214. *Johnson's Case*, Cro. Jac. 609. *Rex v. Hazell*, 13 East, 139. *Regina v. Martin*, 9 Carrington & Payne, 215. Again, there is no allegation that the road is situate in the township of Waverton. *Rex v. Upton-upon-Severn*, 6 Carrington & Payne, 133.

LORD CAMPBELL C. J. It is averred affirmatively to be so in the first count, and that averment is referred to in the second count.

*Knowles.* So large a reference cannot be made from one count to another. *Cur. adv. vult.*

On the 21st November, the judgment of the court was delivered by LORD CAMPBELL C. J.

The second and third counts of the indictment in this case are drawn very inartificially; but we think that after verdict they may be supported.<sup>1</sup> The allegation to which our attention was directed, when the motion was first made for arresting the judgment, certainly does not sufficiently charge that the road was out of repair, namely, "that the said part of the same common highway hereinbefore mentioned, to be ruinous, &c. as aforesaid, was a common highway," &c. This is only a description of the highway, and not an allegation that it was actually out of repair. But there follows an allegation, that the inhabitants of the township "ought to repair and amend the same part of the said common highway, so being ruinous, &c. as aforesaid, when and so often as

<sup>1</sup> "Both the judgment and the marginal note," says Mr. Greaves, "treat this case as if the question being raised after verdict made a difference; but it is clearly erroneous so to treat it." 1 Russell on Crimes, 514 note. 4th ed.

it hath been and shall be necessary, and that the said inhabitants of the said township have not yet done the same." Here we have a clear and specific reference to the first count, which contains a formal allegation, that this part of the highway was out of repair. There are many authorities to show that one count of an indictment may refer to another, and that under such circumstances the maxim applies, *Verba relata inesse videntur*.

The objection that the second and third counts do not show the part of the highway out of repair to be in the township, admits of a similar answer. The first count alleges, "that a certain part of the said highway situate, lying and being in the township of Waverton, &c." (describing it, and stating its length and width), "was, and yet is ruinous," &c.; and the second and third counts allege, "that the said part of the same common highway hereinbefore mentioned, to be ruinous," &c. was a highway, which the inhabitants were bound to repair. It has been determined that any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject "before mentioned." But the local situation of the part of the highway described must necessarily and invariably belong to it, and if once described as being in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation, that it is within the township, seems not to be strictly necessary. We must very much regret the negligence in framing indictments, which causes such discussions; but, we are glad that in this case it has not led to a failure of justice. The rule for arresting the judgment must be discharged.

"It is a novel doctrine in criminal cases," writes Mr. Greaves, "that a defective indictment is cured by verdict. Lord Hale says, 'None of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict,' 2 Hale P. C. 193; and no authority is known for such a doctrine in other cases." 1 Russell on Crimes, 676 note. 4th ed. *Commonwealth v. Morse*, 2 Massachusetts, at p. 130. *Brown v. The Commonwealth*, 8 Massachusetts, at p. 65. "It is a well settled rule of law," said Shaw C. J. "that the statute respecting amendments does not extend to indictments, that a defective indictment cannot be aided by a verdict, and that an indictment, bad on demurrer, must be held insufficient upon a motion in arrest of judgment. The plain rule of the common law, as well as the express provision of the Declaration of Rights, is, that no man shall be held to answer for any crime or offence until the same is fully and plainly, formally and substantially made known to him,

that he may have every advantage of previous notice in making his defence, both upon the matter of fact and law." *Commonwealth v. Child*, 13 Pickering, at p. 200. "A verdict cannot cure an insufficient indictment," said Wilde J. in *Commonwealth v. Collins*, 2 Cushing, at p. 547. And see *Commonwealth v. Bean*, 14 Gray, at p. 54.

"If the count shows a crime within the terms of the statute," said Wightman J. "though defectively, so as to be bad on demurrer, it is good after verdict. *Regina v. Waters* goes on that distinction." *Regina v. Bowen*, 13 Queen's Bench, at p. 795. And in *Regina v. Craddock*, 2 Denison C. C. at p. 34, the same learned judge observed that after verdict an indictment must be construed *ut res magis valeat quam pereat*.

In *Lutz v. The Commonwealth*, 29 Pennsylvania State, 441, which was an indictment for murder, judgment was affirmed on two grounds: "First, that the omissions in the indictment are immaterial; secondly, that they are of a nature to be supplied and cured by the verdict." *Woodworth J.* "The nominatives, the conjunctions, and the punctuation might have been better, but the matter is all there, and in sufficient order to import the crime, and nothing else than the crime, of which the prisoner was convicted."

See also *The State v. Gove*, 34 New Hampshire, 510; note of the reporter to *Regina v. Webb*, 1 Denison C. C. 348.

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## REGINA v. GARDNER.<sup>1</sup>

May 3, 1856.

### *Indictment — Remoteness — False Pretences.*

The prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the chairman of the General Quarter Sessions for the county of Kent.

At the General Quarter Sessions of the Peace for the county of Kent, holden at Maidstone, on Thursday the 3d day of January 1856, before the Right Honorable Charles, Earl of Romney, James Espinasse, and Henry Shovell Marsham, Esquires, and others, her Majesty's justices of the peace for the said county,

<sup>1</sup> Dearsly & Bell C. C. 40; 7 Cox C. C. 136.



William Gardner was tried upon an indictment charging him as follows: that he did, on the 13th day of November 1855, unlawfully, knowingly, and falsely pretend to one Ellen Henrietta Brunsden, that the name of him, the said William Gardner, was William Edgar De Lancy, and that he, the said William Gardner, was paymaster of the ship called the Duke of Wellington, and that the said ship was then lying at Portsmouth, and (the said William Gardner being then dressed in naval officer's uniform) that he, the said William Gardner, was the son of a half-pay officer, who was living at Chelsea, and that his brother was a lieutenant-colonel in the army, by means of which said false pretences the said William Gardner did then and there obtain of and from the said Ellen Henrietta Brunsden twenty pounds weight of bread, twelve pounds weight of meat, three pounds weight of butter, one pound weight of cheese, three pounds weight of sugar, six quarts of beer, and ten quarts of coffee, and other articles of food, together of the value of thirty shillings, of the goods and chattels of the said Ellen Henrietta Brunsden, with intent then and there to cheat and defraud, whereas in truth and in fact the name of the said William Gardner was not William Edgar De Lancy, and whereas in truth and in fact the said William Gardner was not the paymaster of the said ship called the Duke of Wellington, nor was the said ship then lying at Portsmouth. And whereas in truth and in fact the said William Gardner was not the son of a half-pay officer who was residing at Chelsea, but was the son of one William Gardner, a collector of rates at Sheerness; and whereas in truth and in fact the said William Gardner had not a brother, who was a lieutenant-colonel in the army; against the form of the statute, &c.

The evidence on the part of the prosecution, as far as is material for the purpose of this case was, that on the 13th day of November last the defendant, wearing the dress of a naval officer, engaged a lodging of Ellen Henrietta Brunsden (the prosecutrix) at the rate of ten shillings per week; that on the 17th day of November the defendant expressed himself to prosecutrix as being comfortable, and that he should be likely to remain some time, and stated that he was paymaster of the Duke of Wellington, and his name was De Lancy, that the defendant continued a lodger till the 25th of November, and then expressed a wish to become a boarder, and an arrangement was accordingly entered into that he should become a boarder at a guinea a week, that the prosecutrix supplied

the defendant with board, consisting of cooked meat, tea, sugar, bread, butter, cheese, and beer, for the six days following, but the defendant did not pay her any thing for the lodging or board.

Upon the case for the prosecution being closed, it was submitted by counsel for the prisoner that the contract for board was a mere addition to the first contract for lodging, and that what the defendant in fact obtained by the false pretences was an alteration of the first contract, and not goods within the meaning of the statute.

The Chairman overruled the objection, and left the case to the jury, who returned a verdict of guilty. Counsel for the prisoner then applied to the court to reserve the case for the opinion of the Court of Criminal Appeal upon the objection taken, alleging that a case similar to this was then before the court for decision. The court thereupon postponed passing sentence on the prisoner, but ordered him to be detained in custody.

The opinion of the court is requested, whether the objection taken by the prisoner's counsel is valid in law ?

Romney, Chairman.

This case was argued on 26th April 1856, before JERVIS C. J., COLERIDGE J., CRESSWELL J., ERLE J. and MARTIN B.

Horn appeared for the Crown, and Ribton for the prisoner.

*Ribton*, for the prisoner. The conviction was wrong. It is important to observe the dates. When the false statement was made, neither money, chattel, or valuable security was obtained by it; and obtaining lodging by a false pretence is not an offence within the statute. On the 25th November, when the contract to board was obtained, no false pretence was made.

COLERIDGE J. Would it not be a question for the jury, whether there was not a continuing false pretence ?

*Ribton*. To obtain a contract by a false pretence is not within the act. It is not obtaining goods. Here, if any thing besides the lodging was obtained by the false pretence it was not food, but simply a new contract to supply board, and that would not be within the statute. The board might have been supplied, not in consequence of the false pretence made when the contract for the lodging was obtained, but in consequence of the prisoner's manners and conduct after that time, and whilst he was a lodger.

COLERIDGE J. Yes; but your point is, that there was no evidence to go to the jury, even supposing the interval between the false pretence and the contract had only been an hour.

*Ribton.* It is quite clear, that to obtain lodging alone would not be within the statute. Here the contract is for board and lodging united, and it is doubtful whether in any case obtaining board and lodging would be within the statute. It would always be difficult to separate the two so as to show that the articles of food were obtained by means of the false pretence; but here, at all events, the evidence fails altogether to connect the obtaining of the food with the false pretence.

*Horn*, for the Crown. It is indisputable law that the intervention of a contract is no answer to a charge of obtaining goods by false pretences if the contract be part of the fraud. Here the prisoner has obtained goods by means of his false pretences, and the fact that the contract was to pay for the board and lodging together does not make it less an obtaining of goods. In *Regina v. Kenrick*, 5 Queen's Bench, 49, the money was obtained upon the sale of horses which the prosecutor was induced to buy by false pretences.

CRESSWELL J. That is a remarkable case. Sir F. Thesiger, who appeared for the Crown, abandoned the counts for obtaining the money by false pretences.

JERVIS C. J. That case is now under consideration in *Regina v. Burgon*, Dearsly & Bell C. C. 11, and *Regina v. Roebuck*, Dearsly & Bell C. C. 24.

*Horn.* The decision in *Regina v. Kenrick* was acted upon and affirmed in *Regina v. Abbott*, 1 Denison C. C. 273; 2 Carrington & Kirwan, 630. Where money was borrowed from the drawer of a bill by the acceptor for the alleged purpose of paying it, and upon a false pretence that he was prepared with the residue, it was held to be within the statute, *Rex v. Crossley*, 2 Moody & Robinson, 17, and so it was held where a baker delivered short weight to the poor, and presented tickets as if he had delivered full weight according to his contract, *Regina v. Eagleton*, Dearsly C. C. 515. The decision in *Regina v. Codrington*, 1 Carrington & Payne, 661, cannot be considered law unless it can be distinguished from the subsequent cases of *Regina v. Kenrick* and *Regina v. Abbott*, on the ground that the false pretence was not sufficiently proved.

JERVIS C. J. The difficulty in the case of contracts is, where the party deceived gets not the consideration which he expects, but something like it.

*Horn.* In this case the false pretence is clearly proved; it was

a continuing pretence, and the prosecutrix acting upon it was eventually induced to supply the prisoner with board as well as lodging. It is objected that lodging is not within the statute. Land is not within the statute ; but suppose, by a false pretence, I get an estate and a purse of gold ? The articles of food which the prisoner obtained were chattels within the meaning of the statute ; and the fact that the prisoner gained lodging as well as board cannot make any difference. The question whether the food was obtained by the false pretence was for the jury, and they have found that it was.

*Ribton* replied.

*Curr. adv. vult.*

The judgment of the court was delivered on 3d May 1856, by JERVIS C. J. In this case, which was argued before us on Saturday last, the court took time to consider, principally with a view of first taking into consideration the cases of *Regina v. Roebuck* and *Regina v. Burgon*, which have just been disposed of. It was an indictment for obtaining goods under false pretences, the circumstances being, that the prisoner represented himself to be the paymaster of the Duke of Wellington, of the name of De Lancy, upon which he made, with the prosecutrix, a contract for board and lodging, at the rate of one guinea a week, and he was lodged and fed as the result of the contract in consequence of the engagement so entered into upon that which was found to be a false pretence ; and the question which was submitted to us was, whether it was a false pretence within the statute ; or rather whether the conviction was right ? That we have considered, and on consideration we are of opinion that the conviction was not right, because we think that the supply of articles, as it was said upon the contract made by reason of the false pretence was too remotely the result of the false pretence in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretences. We therefore think the conviction should be reversed.

*Conviction quashed.*

The doctrine of *remoteness*, which is one of the most important in the entire range of the criminal law, has received little or no attention from the text-writers, with the single exception of Mr. Bishop, who has discussed it in Chapters XX. and XXX. of his Commentaries on the Criminal Law, and incidentally elsewhere in that book. It is purposed in this note to illustrate this doctrine by a reference to such cases as have fallen within the observation of the writer.

In the principal case it was held that the conviction was wrong, because the supply of articles, as it was said upon the contract made by reason of the false pretence, was too remotely the result of the false pretence in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretences. So where an indictment alleged that the prisoner pretended that he was a member of the naval reserve, and entitled to receive thirty shillings for a quarter's payment next day, whereby he obtained board and lodging at fourteen shillings a week, and sixpence in money. The prisoner went to a lodging-house, and represented that he was a member of the naval reserve, and was entitled next day to receive thirty shillings for a quarter's payment; believing this representation, the prosecutor agreed to let him have board and lodgings at his house for a week at fourteen shillings. The prisoner then said he was short of cash, and asked the prosecutor to lend him sixpence, which he did. The prisoner remained some days, and it was then discovered that his statements were false. Hill J. said that this case could not be distinguished from *Regina v. Gardner*; for although the prisoner obtained money or goods from the prosecutor, he did it by means of a contract, and he obtained the contract only by means of the false pretences. It is too remote to say that he obtained the money or goods by false pretences. *Regina v. Bryan*, 2 Foster & Finlason, 567 (1861).

A conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence. Whether or not there is such a direct connection is a question for a jury. *Regina v. Martin*, Law Rep. 1 C. C. 56; 10 Cox C. C. 383. Bovill C. J.: "It is obvious that there are many cases within the mischief of the statute where the thing obtained is not in existence when the false pretence is made. Thus a man, by false pretences, may induce a tailor to make and send him a coat, or a friend to lend him money, which may consist of bank-notes not printed when the false pretence was made on which the loan was granted. So also a man might obtain coals which were not got, and therefore not a chattel in the eye of the law at the time of making the pretence. It is absurd to say that the chattel obtained must be in existence when the pretence is made. The pretence must, indeed, precede the delivery of the thing obtained; but at what distance of time? What is the test? Surely this, that there must be a direct connection between the pretence and the delivery,—that there must be a continuing pretence. Whether there is such a connection or not is a question for the jury. In *Regina v. Gardner*, the prisoner obtained, at first, lodgings only, and, after he had occupied the lodgings more than a week, he obtained board; and it was held that the false pretence was exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made. It is true that in *Regina v. Bryan*, 2 Foster & Finlason, 567, the contract was for board as well as lodging; but there the indictment was for having obtained sixpence as a loan some time after the contract for board and lodging had been entered into; and it is clear that the obtaining the loan was as remote from the false pretence under which the contract for board and lodging had been entered into, as the obtaining of the board was from the false pretence made in *Regina v. Gardner*. In the present case, when the false pretence

was made and the order given, it was never contemplated that the matter should rest there; and we have no difficulty in holding that there was a continuing pretence, and a delivery obtained thereby." Willes J.. "I will only add that, since the cases of *Regina v. Abbott*, 1 Denison C. C. 273, and *Regina v. Burgon*, Dearsly & Bell C. C. 11, it is impossible to contend seriously that the case is not within the statute because the chattel is obtained under a contract induced by the false pretence."

Upon the trial of an indictment for a nuisance to a harbor by erecting and continuing piles and planking in the harbor, and thereby obstructing it and rendering it insecure, it was found by a special verdict, that "by the defendant's works, the harbor is in some extreme cases rendered less secure;" and it was held that the defendant "could not be made criminally responsible for consequences so slight, uncertain, and rare, as were stated by this verdict to result from his works." *Rex v. Tindall*, 6 Adolphus & Ellis, 143, and 1 Nevile & Perry, 719. In *Regina v. Russell*, 3 Ellis & Blackburn, 942, on the trial of an indictment for obstructing a navigable piece of water, the jury were asked whether they thought the erection would prove a "material nuisance," in which case they were to find a verdict of guilty; but were told that if they thought the "nuisance" was so slight, rare, and uncertain, that the defendant ought not to be made criminally liable for it, they should acquit him, and the jury said that they considered the erection, "although a nuisance, was not sufficiently so to render the defendant criminally liable," and thereon an acquittal was entered; it was held by Coleridge and Crompton JJ., and semble by Lord Campbell C. J., that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction was so insignificant; and that, therefore, there was not a misdirection warranting a new trial.

By an old act, an ancient highway running over the land of Lord Stourton was made a turnpike, and afterwards collieries were worked on each side of the road, and railways made from time to time across the road for the conveyance of the coals from the collieries. In the 1 & 2 Geo. IV. a new act was passed for repairing the same road. One of the former railways was continued and new railways made afterwards across the road for the same purposes as before. By a clause in this act a penalty, recoverable on summary conviction, was imposed on any person who made any railway across the road "without the consent of the trustees or legal authority:" and it was held that the making and continuing of the railways was indictable, and that no inference could be drawn to the contrary from the facts of the case or the words of the last act. To do the work complained of the turnpike road was dug into, but filled up again and restored to its former state, except that the railroad remained, forming a groove of wood, adapted to the wheels of the railway carriages, and so far sunk into the road that the highest part of it was on a level with the road; and, upon a special case empowering the court to draw inferences as a jury, after a verdict of guilty, it was held that the court could not pronounce the injury created by this work to be too slight and uncertain to be indictable. *Regina v. Charlesworth*, 16 Queen's Bench, 1012; 4 New Sessions Cases, 703; 5 Cox C. C. 174. See *Regina v. Train*, 2 Best & Smith, 640.

Where an inquisition alleged that the defendants were trustees under an act of Parliament, and that it was their duty to contract for the repair of a road, and also to repair the road, and that they did feloniously neglect to contract for the reparation of the said road, and did feloniously neglect to repair the same, and that W. B. being riding in a barrow along the said road, the defendants by their neglect to contract for the reparation of the said road, and by their neglect to repair the same, did cause one wheel of the said barrow to fall into a large hole in the said road, and the said W. B. to be thereby thrown with great violence from the said barrow upon the ground, whereby he was killed; it was held that the inquisition was bad. Lord Campbell C. J.: "Not only must the neglect, to make a party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect." Here the death was not the direct consequence of the neglect charged. *Regina v. Pocock*, 17 Queen's Bench, 34, 39. Ante Vol. I. p. 65.

In cases of neglect of children of tender years it must be both alleged and proved that the health was injured. In *Regina v. Phillpot*, Dearsly C. C. 179, the indictment alleged that the prisoner was the mother, and had the care of an infant female child unable to support itself, and that it was the duty of the prisoner to support the child, but that the prisoner unlawfully neglected to support it, and unlawfully abandoned it without necessary food for a long space of time, whereby the child was greatly injured and weakened. The prisoner was the wife of a seaman, and received a portion of his pay, and was able to work and get her living if she chose; she left the child without food from Monday evening till Thursday morning, and but for the attention of a poor neighbor, the child must have suffered most severely, and might probably have died for want of food, and though it did suffer in some degree from want of food, it was not to any serious extent; and it was held that the conduct of the prisoner in absenting herself, irrespective of any actual injury to the child, was not a misdemeanor at common law, and therefore it was necessary to prove the averment that the child was greatly injured and weakened; and that the evidence that the child had suffered "to some but not to any serious extent" was not sufficient; as it did not show any injury to the health. Jervis C. J.: "We may adopt the language of the Judges in *Rex v. Friend*, Russell & Ryan C. C. 20. That in order to constitute an offence indictable as a misdemeanor, it is necessary to state a breach of duty or contract in refusing or neglecting to provide for an infant of tender years, unable to provide for itself, and that the health of the infant has been injured by the neglect." See *Regina v. Cooper*, 1 Denison C. C. 459; *Regina v. Hogan*, 2 Denison C. C. 277.

To the doctrine of *remoteness* may be referred the opinion of Bramwell B. in *Regina v. Moah*, Dearsly & Bell C. C. 550. In this case, the false making of a letter of recommendation, with intent fraudulently to obtain a situation as a police constable, was held, Bramwell B. doubting, to be a forgery at common law. Bramwell B.: "The letters are of no validity in themselves, and I do not know but that the office might have been obtained without them, although they may have had an operation on the mind of him to whom they were presented. It seemed to me at the trial no more than if I were to produce a letter purporting to be from the Duke of Wellington, inviting me to dine, and say, See

what a respectable person I am." In *Regina v. Hodgson*, Dearsly & Bell C. C. 3, which was a case of forging a diploma of the College of Surgeons, the conviction was quashed on the ground that the prisoner had no intent, in forging or in uttering, to commit any particular fraud, nor was there in fact any person defrauded. Jervis C. J.: "The intent must not be a roving intent, but a specific intent."

Acts remotely leading towards the commission of a crime are not to be considered as *attempts* to commit it. "The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that *all* acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." Judgment in *Regina v. Eagleton*, Dearsly C. C. at p. 538. But as Wightman J. observed at p. 551: "Every case must be taken with its own peculiar circumstances; it is impossible to lay down an exact rule." In the course of the argument, Maule J. said at p. 525: "The doubt may arise—what is an attempt? Must it not be a proximate attempt? Does a man, *intending* to murder, *attempt* to do so if he buys a dagger and poison, but uses neither the one nor the other? if a man intends to commit an offence at a distant place, getting into a railway train, or putting on his shoes, or shaving himself in the morning, would not be an attempt to do so." The case of *Regina v. Roberts*, Dearsly C. C. 539, well illustrates this principle. The prisoner, with the intent to coin counterfeit half-dollars of Peru, caused to be made and procured at Birmingham dies necessary for the purpose of making such counterfeit coin, but which would not alone produce it; but the prisoner intended to procure the rest of the necessary apparatus for the purpose and with the intention of using the entire apparatus, when procured, in making the counterfeit coin. The jury found that the prisoner intended to make only a few of the counterfeit coins in England by way of trying whether the apparatus would answer before sending it out to Peru to be there used in making counterfeit coin. And upon a case reserved, it was held that the conviction was right. Jervis C. J.: "This is not an indictment for an attempt to commit a statutable offence, as was the case in *Regina v. Williams*, 1 Denison C. C. 39, where the charge was an attempt to administer poison. Here there is no direct attempt to coin; but the indictment is founded on a criminal intent, coupled with an act immediately connected with the offence. It is difficult, and perhaps impossible, to lay down a clear and definite rule, to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence; at all events I shall not attempt to do so. Many acts, coupled with the intent would not be sufficient. For instance, if a man intends to commit a murder, and is seen to walk towards the place of the contemplated scene, that would not be enough; but although it is sometimes difficult to say whether a case comes within or ranges without the line, it is not difficult to say that the act done in this case is one which falls within it. Nobody can doubt that the prisoner was in possession of machinery necessarily connected with the offence, for the express purpose of committing it, and which was obtained and could be used for no other purpose." Parke B.: "I quite agree that if the prisoner had gone to Birmingham merely to procure dies, that would be too *remote*. I quite agree with the law laid down



in *Regina v. Eagleton*, that an attempt at committing a misdemeanor is not an indictable attempt unless it is an act directly approximating to the commission of an offence, and I think this act is a sufficient approximation. I do not see for what lawful purpose the dies of a foreign coin can be used in England, or for what purpose they could have been procured except to use them for coining. The acts done are clearly sufficiently leading to the offence to be indictable." The court seem to have been clear that making a few specimens to ascertain whether they would answer the purpose would have been a felony within the statute; and that even making a few specimens to put in a cabinet would be so also.

In *Regina v. Taylor*, 1 Foster & Finlason, 511, the prisoner was indicted for attempting to set fire to a stack of corn with a lucifer match. Pollock C. B. told the jury "that it was clear that every act committed by a person with the view of committing the felonies mentioned in the 9 & 10 Vict. ch. 25, § 7, was not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, *and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution*. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." "The dictum in italics seems to be erroneous," writes Mr. Greaves, "for there is no doubt that a man may be guilty of an attempt to commit a crime, though he be prevented by superior force from doing so." 1 Russell on Crimes, 1054. 4th ed. "There is a great difference," said Blackburn J. "between preparations antecedent to the commission of an offence and an attempt to commit the offence, as in the case of merely going to buy a gun wherewith to commit a murder." *Regina v. Cheeseman*, 9 Cox C. C. at p. 103.

## COMMONWEALTH v. BEAN.<sup>1</sup>

October Term 1853.

### *Indictments upon Statutes.*

An indictment upon Rev. Sts. ch. 126, § 42, for malicious destruction of glass, must aver the glass to be part of a building. An allegation that it was "in" a certain building is not sufficient.

THE defendant was indicted upon the Rev. Sts. ch. 126, § 42, which enacts that every person who "shall maliciously or wantonly break the glass, or any part of it, in any building not his own, or shall maliciously break down, injure, mar or deface any

<sup>1</sup> 11 Cushing, 414.

fence belonging to or enclosing lands not his own, or shall maliciously throw down or open any gate, bars or fence, and leave the same down or open, or shall maliciously and injuriously sever from the freehold of another any produce thereof, or any thing attached thereto, shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding one hundred dollars." The indictment averred that the defendant, "with force and arms, wilfully, maliciously, wantonly, and without cause, did break and destroy the glass, to wit, two panes of glass of the value of ten cents each, in a certain building there situate, not his own, but which building then and there belonged to and was the property of one Dorcas B. Prentice, &c."

After a verdict of guilty, the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own.

*B. F. Butler*, for the defendant.

*R. Choate*, Attorney General, for the Commonwealth.

METCALF J. It is admitted by the counsel for the Commonwealth, that the section of the statute, on which this indictment is framed, was intended to punish the malicious and wanton breaking of glass which is part of a building. And it is argued by him, that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in a statute may be, and not unfrequently must be, ascertained by examination of the context. In the present case, it is from the context that the words "glass in a building" are understood on all hands, to mean glass which is part of a building. But the court, in ascertaining the offence with which the defendant is charged, cannot look beyond the words of the indictment itself. If those words do not sufficiently charge the offence which the statute was meant to punish, the indictment is fatally defective. 2 Hawkins P. C. ch. 25, § 111. *Commonwealth v. Slack*, 19 Pickering, 304. *Commonwealth v. Clifford*, 8 Cushing, 215. *Commonwealth v. Stout*, 7 B. Monroe, 247. We are therefore of opinion that the indictment in this case will not sustain a judgment against the defendant. For aught that the indictment shows, the glass, which he is charged

with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building.

*Judgment arrested.*<sup>1</sup>

In setting out a statute offence, it is in general sufficient to describe it in the words of the statute; because no allegation of any thing more than the words of the statute necessarily import, is required in order to show that the statute offence has been committed by the defendant. There are exceptions to this rule; still it is to be regarded as the general rule, to prevail and have its effect, unless some good reason, arising from established precedent, or exact analogy, is shown to the contrary. *Hopkins v. The Commonwealth*, 3 Metcalf, at p. 465. *Commonwealth v. Dana*, 2 Metcalf, at p. 341. *Commonwealth v. Kelly*, 12 Gray, at p. 176. *United States v. Gooding*, 12 Wheaton, at pp. 473, 474. "The cases are few and exceptional," said Foster J. "in which an indictment which follows the words of the statute will be held to be insufficient." *Commonwealth v. Raymond*, 97 Massachusetts, at p. 570. On the contrary, Lord Denman C. J. observed that "there are many instances in which, if merely the statutory form were followed, no offence would be charged." *Martin v. The Queen*, 8 Adolphus & Ellis, at p. 486. And Morton J. "This indictment describes the offence in the very words of the statute. This usually is not sufficient." *Commonwealth v. Pray*, 13 Pickering, at p. 362. We purpose to consider the exceptional cases and the principle on which they proceed.

According to the rule of pleading as laid down in Hawkins's Pleas of the Crown, it is not "always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly allege the fact in the doing or not doing whereof the offence consists, without any the least uncertainty or ambiguity." 2 Hawkins P. C. ch. 25, § 111. A statute must often use general terms and comprehensive descriptions; whereas an indictment requires certainty in charging the offence so specifically as to give the party notice of what he is to meet, and enable him to traverse the facts averred. This class of statute offences are not sufficiently described in an indictment by being set out in the words of the statute, without more, because those words do not, *ex vi terminorum*, import all that is necessary to a legal description of the offence.

When an indictment follows the words of a statute, it does not necessarily

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<sup>1</sup> A similar decision was made in Middlesex, October term 1854. *Commonwealth v. Benjamin F. Lindsay*. A complaint, made before a justice of the peace, by Joseph Shattuck, alleged that the defendant, at a time and place named in the complaint, "a certain quantity of window glass, in a building not his own, but attached to the realty of said Shattuck, of the value of five dollars, of the property of the said Shattuck, did then and there wilfully and wantonly break and destroy by throwing stones at the same." Upon this complaint the defendant was tried and convicted in the court of common pleas, and brought the case to this court by bill of exceptions. And in this court, upon the motion of the defendant, judgment was arrested.

*J. M. Randall*, for the defendant.

*J. H. Clifford*, Attorney General, for the Commonwealth.

follow that those words have the same meaning in the indictment which they have in the statute. If there is nothing in the context or in the other parts of the statute, or in statutes in *pari materia*, to control or modify the sense and meaning of the terms in which the offence is defined, then it may be presumed that the terms in the indictment are used in the same sense with those in the statute, and whatever that prohibits the indictment charges. In such case, the offence may be described and charged in the words of the statute. Otherwise, it may be necessary to frame the indictment in such terms as to designate the offence intended with precision. *Commonwealth v. McCarron*, 2 Allen, 157. *Commonwealth v. Cox*, 7 Allen, 577. *Commonwealth v. O'Connor*, 7 Allen, 583. "The tests are these," said Wells J. in a very recent case: "If every allegation may be taken to be true, and yet the defendant be guilty of no offence, then it is insufficient, although in the very words of the statute. *Commonwealth v. Squire*, 1 Metcalf, 258. But when, by using the words of the statute, 'the act, in which the offence consists, is fully, directly and expressly alleged, without any uncertainty or ambiguity, then it is sufficient so to allege it.' *Commonwealth v. Welsh*, 7 Gray, 324. *Commonwealth v. Ashley*, 2 Gray, 356." *Commonwealth v. Harris*, 13 Allen, at p. 539. In *Commonwealth v. Stout*, 7 B. Monroe, at p. 249, this rule is well stated: "An indictment in the words of a statute, is not always sufficient. Whether sufficient or not, depends upon the manner of stating the offence in the statute. If every fact necessary to constitute the offence charged, or necessarily implied by following the words of the statute, the indictment in the words of the statute is undoubtedly sufficient, otherwise it is not. Here the averment of the attempt to remove the person of color, during the pendency of a suit for freedom, does not necessarily imply a knowledge of the existence of such suit; and consequently this indictment is insufficient on account of the absence of this allegation." The statute on which the indictment in this case was founded, subjected to punishment the attempt to remove any person of color from the commonwealth, during the pendency of a suit for freedom, and was silent as to the knowledge of the pendency of such suit.

In *United States v. Pond*, 2 Curtis C. C. at p. 268, Mr. Justice Curtis thus lucidly states the rule and an exception: "This is an indictment for a misdemeanor created by statute. In general, it is sufficient to describe such an offence in the words of the statute. *United States v. Mills*, 2 Peters, 38. This indictment follows the words of the statute. It is sufficient therefore unless the words of the statute embrace cases which it was not the intention of the legislature to include within the law. If they do, the indictment should show that this is not one of the cases thus excluded. In the case of *The Mary Ann*, 8 Wheaton, 380, speaking of an information, Chief Justice Marshall said: 'If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature;' and this is only another mode of expressing the same rule which I have stated above."

A city ordinance provided that "no owner or person having the care of any sheep, swine, horses, mules, oxen, cows or other grazing animals, shall permit

or suffer the same to go at large or stop to feed on any street," &c. A complaint which averred that the defendant permitted and suffered two cows "to stop and feed" in certain public streets is bad on motion in arrest of judgment. Shaw C. J. . "The effective words declaring the penalty in this law are, 'no owner or person having the care of any cows,' &c. 'shall permit or suffer the same to stop to feed in the public streets.' But in looking at the enumeration, it is, any horses, cows or other grazing animals. Then, upon the ordinary rule of construction, taking the whole clause together, it is manifest that it was intended to prohibit cattle to go at large, in the streets, or to stop to feed in the streets, by grazing, by permitting them to stop for the purpose of feeding on the grass growing in the street. If this is the act prohibited, and the offence intended by the by-law to be punished, the complaint, we think, should in some form charge that the accused suffered and permitted his cows to stop on their way for the purpose of feeding. But this complaint does not so charge. Suppose the defendant had suffered cows to eat grain, from a trough or bucket, standing in the street named. Such an act would be within the words of this complaint, but not the offence prohibited by the by-law." *Commonwealth v. Bean*, 14 Gray, 52.

In *Commonwealth v. Wolcott*, 10 Cushing, 61, the indictment was founded on a statute which enacted that whoever "shall falsely assume or pretend to be a justice of the peace, sheriff, deputy sheriff, coroner, or constable, and shall take upon himself to act as such, or to require any person to aid or assist him in any matter, pertaining to the duty of a justice of the peace, sheriff, deputy-sheriff, coroner, or constable, he shall be punished," etc. Rev. Sts. ch. 128, § 19. "We think," said Cushing J. "the crime here described is the false personation of a sheriff or other officer of this commonwealth; for the conditions are, that the party shall falsely assume or pretend to be such officer, and shall take upon himself to act as such. That signifies that he falsely pretends to possess official authority. But he cannot exercise official authority as such officer, unless commissioned according to its laws. Of course, to pretend such authority he must assume to be an officer of this commonwealth. This qualification being of the essence, it must be averred in the indictment. It is not averred in either of the counts of the present indictment. That is a fatal defect, and on that ground judgment must be arrested."

In Massachusetts, the General Statutes, ch. 84, § 1, enacts in very general terms: "Whoever keeps open his shop, warehouse, or workhouse, or does any manner of labor, business, or work, except works of necessity and charity," shall be punished as therein provided. Literally, "whoever keeps open his shop" subjects himself to the penalty; but it is obvious that more than this is meant as constituting the offence. And in *Commonwealth v. Collins*, 2 Cushing, 556, it was held that the intent of the statute was to prohibit the opening of shops, warehouses, and workhouses for the purpose of work or the transaction of business, and that an indictment should allege that the defendant kept his shop open for the purpose of transacting business, or for some other unlawful purpose. It might have been kept open from necessity, to remove property therefrom threatened with destruction by fire, or it might have been open for some religious meeting, or for promoting some charitable purpose, which, although against the words of the statute, could not be considered as against its true meaning. The charge in

the indictment, therefore, may have been proved, and yet the defendant may not have been guilty of any offence. *Commonwealth v. Lynch*, 8 Gray, 384. *Commonwealth v. Wright*, 12 Allen, 187.

The case of *Commonwealth v. Slack*, 19 Pickering, 304, was an indictment on a statute, the operative words of which were "that if any person shall knowingly or wilfully remove or convey away any human body," such person shall, on conviction, be adjudged guilty of felony. The indictment merely followed the words of the statute, without alleging with what intent the body was removed. "We are of opinion," said Mr. Justice Wilde, "that the removal of a dead body is not an offence within the true meaning of the statute, unless it is removed with the intent to use it or dispose of it for the purpose of dissection. This being the meaning of the prohibitory clause, the indictment ought to have averred that the defendants removed the dead body with the intention to use it or dispose of it for the purpose of dissection. The criminal nature of an offence is a conclusion of law from the facts and circumstances of the case. The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offence charged. As there is no averment in this indictment, that the defendants removed the dead body with the intent to dispose of it for the purpose of dissection, and as we consider such intent as the essence of the crime, the indictment is defective, and that judgment must be arrested."<sup>1</sup>

The Revised Statutes of Massachusetts, ch. 125, § 15, enacts: "If any person shall, by force and violence, or by assault and putting in fear, feloniously rob, steal and take from the person of another, any money or other property which may be the subject of larceny, he shall be punished," &c. Metcalf J.: "The words of this section do not set forth, and were not intended to set forth, fully, directly and expressly, all that is necessary to constitute the offence thereby intended to be punished. To constitute that offence, the articles stolen must be carried away by the robber, and must be the property of the person robbed, or of some third person. These facts, therefore, must be alleged, in an indictment on that section, in the same manner in which they are required to be alleged in an indictment at common law. And as they are not alleged in this indictment, judgment must be arrested." *Commonwealth v. Clifford*, 8 Cushing, 215. *Commonwealth v. Kelly*, 12 Gray, at p. 176.

Every indictment for felony, whether it be a felony at common law or by statute, must allege that the act which forms the subject-matter of the indictment was done "feloniously," although that word is not contained in the statute which ascertains and describes the essentials of the crime. The word "feloniously" is a term of art for which no equivalent expression can be substituted. Cockburn C. J.: "All the text-books lay down, as a general proposition applicable to all felonies, that the indictment must allege that the act was done feloniously. It is a well-founded rule that there shall be on every indictment a distinct intimation to the person to be tried, whether the offence with which he stands

<sup>1</sup> Penhallo's Case, Cro. Eliz. 281, cited by Mr. Justice Wilde, does not sustain the position for which he cites it. It is thus reported: "He was indicted upon the 5 Edw. VI. ch. 4, for drawing his dagger in the church of B. against J. S., and doth not say (*according to the statute*) to the intent to strike him; and for this cause it was void." The operative words of the statute were entirely omitted in the indictment. The merely drawing the dagger in the church was no offence.

charged is a felony or a misdemeanor. Great confusion would arise if the indictment merely stated the facts required to constitute the offence without that intimation. It is safer to adhere to the rule so laid down, and to the invariable practice in accordance with it. This indictment does not conform to that rule and practice, and therefore the conviction cannot be supported." *Regina v. Gray, Leigh & Cave* C. C. 365; 9 Cox C. C. 417. *Jane v. The State*, 3 Missouri, 61. *Williams v. The State*, 8 Humphreys, 585. *Mears v. The Commonwealth*, 2 Grant (Penn.) 285.

The 24 & 25 Vict. ch. 96, § 27, makes the larceny of "any valuable security other than a document of title to lands" felony. An indictment under this section must particularize the kind of valuable security stolen, because it is not every valuable security, but only such as is not included in the term "document of title to lands," that is within the statute. *Regina v. Lowrie*, Law Rep. 1 C. C. 61; 10 Cox C. C. 388.

In *Martin v. The Queen*, 3 Nevile & Perry, 472; 8 Adolphus & Ellis, 481, the offence was created by statute respecting false pretences. The indictment described the offence in the words of the statute; that is, the obtaining goods by false pretences. But the indictment was held bad for not pointing out with sufficient certainty whose goods were so obtained; that is, the person in respect of whose goods the offence was committed was not described, though the offence was described in the words of the statute. The goods might have been the goods of the defendant himself, consistently with the averments in the indictment. "It is not enough," said Lord Denman C. J., "to state the offence in general terms; the enactment assumes that the words shall be so employed as to show that some offence has been committed. It is a common principle of law, that every criminal charge shall be made with convenient precision and certainty. In this case not only is the offence not described with convenient certainty, but no offence is described at all." *Douglas v. The Queen*, 13 Queen's Bench, at pp. 80, 81. *Sill v. The Queen*, 1 Ellis & Blackburn, 553, and *Dearsly* C. C. 132. *Regina v. Bullock*, *Dearsly* C. C. 653. *Regina v. Wickham*, 10 Adolphus & Ellis, 34.

In *The King v. Everett*, 8 Barnewall & Cresswell, 114, and 2 Manning & Ryland, 35, which was an indictment under the 6 Geo. IV. ch. 108, § 34, a count alleged that certain spirituous liquors were about to be imported, in respect of which certain duties would be payable, and that R. H. was a person employed in the service of the customs of our Lord the King, and that it was the duty of R. H. as such person so employed in the service of the customs as aforesaid, to arrest and detain all such goods and merchandises as should within his knowledge be imported, which, upon such importation thereof, would become forfeited, and that the defendant unlawfully solicited R. H. to forbear to arrest and detain the said goods; it was objected, in arrest of judgment, that as the law did not cast upon all persons in the service of the customs the duty of making seizures, and the count did not show that H. was a person coming within any of the three classes described in section 34 of 6 Geo. IV. ch. 108, the count was bad: and the court held that the allegation that it was H.'s duty to seize goods, which upon importation were forfeited, was an allegation of matter of law. That being so, the facts from which that duty arose ought to have been

stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly was not the duty of every such person, and therefore the indictment was bad. This case was stated and followed in *United States v. Stowell*, 2 Curtis C. C. 153, 161.

An indictment on St. 1855, ch. 77, for fraudulently conveying real estate, without giving notice of an encumbrance, does not describe the real estate conveyed with sufficient certainty by describing it as "a certain parcel of real estate situated in Salem in the county of Essex." *Bigelow J.*: "This indictment wants that certainty and precision in its material allegations, which are essential in criminal pleading, in order that the defendant may have the offence, with which he is charged, fully and plainly, substantially and formally, described to him. It contains no description or allegation by which the parcel of land can be known or identified, which the defendant is charged with having conveyed without disclosing an existing incumbrance thereon. This is a fatal defect. Under St. 1855, ch. 177, on which this indictment is founded, the substance of the offence cannot be alleged without such description or allegation. There is nothing by which to fix the identity of the offence. The indictment lacks certainty to a common intent. The defendant may have owned other parcels of land in the city of Salem, which he conveyed to the prosecutor on the day alleged. From the indictment alone therefore it is impossible to say with certainty to what parcel of land the charge relates, or to know that the conveyance proved at the trial was of the same parcel as that on which the indictment was founded. Whenever, in charging an offence, it is necessary to describe a house or land, the premises must be set out in terms sufficiently certain to identify them." *Commonwealth v. Brown*, 15 Gray, 189.

The 24 & 25 Vict. ch. 96, § 58, enacts: "Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, shall be guilty of a misdemeanor." An indictment under this section must specify the building intended to be broken into, and per *Crompton J.*, it must also specify the felony intended to be committed. *Regina v. Jarrald, Leigh & Cave* C. C. 301; 9 Cox C. C. 307. *Crompton J.*: "The language of the statute is clear. The words are 'any building.' Then, the rules of pleading and the precedents show that that building must be specified. It is said that a general intent to break into a building is within the mischief of the act. Assuming that to be so, that general intent is provided for by the following clause, which makes the being found in possession of implements of house-breaking punishable. There must be an intent to break into a specific house and commit a specific felony, which must be alleged and proved in the usual way." But see 2 Russell on Crimes, 70 note. 4th ed.

Where a statute made it an offence to "give credit to any student of Yale College, being a minor, without the consent in writing of his parent or guardian, or of such officer or officers of the college as may be authorized by the government thereof to act in such cases, except for washing or medical aid;" it was held, by construction of law, that, to make a violation possible, there must first be some officer of the college authorized by the government thereof to give the



consent; consequently, that this authority must be set out in an information on the statute. *Morse v. The State*, 6 Connecticut, 9.

In an indictment for an unlawful sale of spirituous and intoxicating liquors, it is not sufficient to aver, in the words of the statute, that the defendant did sell, but it must be averred, that, at a time and place stated, he did sell to some person named, or to a person unknown, as the case may be. *Commonwealth v. Thurlow*, 24 Pickering, 374. See *Commonwealth v. Moore*, 11 Cushing, 600, which was an indictment at common law; *Commonwealth v. Dean*, 21 Pickering, 334; *The State v. Brown*, 8 Missouri, 210.

A statute makes it an offence to "fraudulently keep in possession," counterfeit bank-notes. To constitute this crime, although the statute only uses the word "fraudulently," it must be averred and proved that the defendant had knowledge that the notes were base, and an intention to pass them. This is necessary to make the possession "fraudulent." *Fergus v. The State*, 6 Yerger, 345. *Owen v. The State*, 5 Sneed, 433, 495.

With respect to the ordinary form of indictment for *embezzlement*, Crompton J. observed, during the argument in a very recent case: "With regard to that offence, it is the invariable practice for the indictment to state in what manner it is that the party is guilty of larceny, by describing him as the servant or in the employment of some person, and that he did receive into his possession the particular thing on account of his master, and that he did embezzle that which he so received, and then to conclude in the technical terms of the law, and so he did feloniously steal the particular thing. But for the practice I should have said that the conclusion would have been sufficient without more, that is, that the indictment should have simply charged a larceny, leaving the particular circumstances necessary to bring it within the act as matter of evidence." *Regina v. Gray*, Leigh & Cave C. C. at p. 368. In *Commonwealth v. Simpson*, 9 Metcalf, 138, the court were of opinion, that the two offences of larceny and embezzlement are so far distinct in their character, that under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and that, in cases of embezzlement, the proper mode is, to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. This is indicated by setting forth the fiduciary relation, or the capacity in which the defendant acted, and by means of which the property came into his possession, and by charging the fraudulent conversion. Although the party, in the language of the statute, "shall be deemed to have committed the crime of simple larceny," yet it is a larceny of a peculiar character, and must be set forth in its distinctive character. See *The King v. Johnson*, 3 Maule & Selwyn, 539, 548.

When the subject of an indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within its meaning; as, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operates as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the party with having forged a certain receipt for money, to wit, the sum of £25 mentioned and contained in

the said paper, called a navy bill, which forged receipt was as follows, that is to say, "William Thornton, William Hunter," was held to be bad, because it did not show, by proper averments, that these signatures imported a receipt. *Rex v. Hunter*, 2 Leach C. C. 624; 2 East P. C. ch. 19, § 36, p. 928. *Bynam v. The State*, 17 Ohio State Rep. 142. See also per Nash J. in *The State v. O'Neal*, 7 Iredell, at p. 254.

When the statute punishes an offence, by its legal designation, without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named, at common law. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute. Thus, in an indictment for the statute crime of burglary, it is not necessary to allege that the act was done "burglariously." *Tully v. The Commonwealth*, 4 Metcalf, 357.

And, finally, it may be observed that an indictment founded on a statute cannot be sustained, if instead of the words of the statute, it uses other words which might have a different signification. *Regina v. Gregory*, Law Rep. 1 C. C. at p. 79. *Commonwealth v. Stahl*, 7 Allen, 304. *Commonwealth v. Lambert*, 12 Allen, 177, 179. *Commonwealth v. Intoxicating Liquors*, 97 Massachusetts, 332. *Rex v. Chalkley, Russell & Ryan* C. C. 258.

See *Rex v. Tannet, Russell & Rylan* C. C. 351; *Regina v. Morris*, 9 Carrington & Payne, 89; *Regina v. Crossley*, 10 Adolphus & Ellis, 132; *The State v. Ladd*, 2 Swan, 226; *Pearce v. The State*, 1 Sneed, 63; *The State v. Stimson*, 4 Zabriskie, 478; *The People v. Wilber*, 4 Parker C. C. 19; *The People v. New York Central Railroad Co.* 5 Parker C. C. 195; *The People v. Standish*, 6 Parker C. C. 111; *The State v. Pugh*, 15 Missouri, 509; *The State v. Klesslering*, 12 Missouri, 565; *The State v. Click*, 2 Alabama, 26; *Anthony v. The State*, 29 Alabama, 27; *Commonwealth v. Cook*, 13 B. Monroe, 149; *The State v. Raines*, 3 McCord, 533.

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### COMMONWEALTH v. JAMES.<sup>1</sup>

March Term 1823.

#### *Larceny — Actual and Constructive Possession.*

Where a miller, having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris, it was held to be larceny.

It was held that the government was not bound to produce the truckman who carried the barilla to and from the mill, to prove that it was not adulterated in the transportation, although there was only circumstantial evidence that it was adulterated by the miller.

The word "barilla" is good in an indictment, to denote the subject of larceny.

THE defendant was indicted for stealing three tons weight of barilla.

<sup>1</sup> 1 Pickering, 375.

At the trial in November term 1822, before Parker C. J. it was in evidence that Park, having a quantity of barilla which he wished to have ground, sent it to a mill kept by the prisoner for grinding plaster of Paris, barilla, and other articles; that after it was ground, a mixture, consisting of three-fourth parts of barilla and one-fourth part of plaster of Paris, was returned by the same truckman who carried the barilla to the mill, he being on both occasions in the employment of Park.

The prisoner's counsel contended, that, it appearing that the barilla was sent to and brought from the mill by a truckman, who, for aught appearing in the case, was alive and within the reach of the process of the court at the time of trial, without his testimony there was no legal proof that the barilla was ever delivered to the prisoner, or the mixture received from him. But there being evidence that the barilla was ground at the prisoner's mill, by his order, he being sometimes present, and a bill of the expense of grinding having been made out and presented by him and the money received by him, there being also evidence tending strongly to show that he had practised a fraud upon the barilla, the objection was overruled; and whether the mixture was accidental or fraudulent, and whether it was caused by the prisoner or not, were questions left to the jury to decide; upon a great deal of circumstantial evidence, no person having seen him do it, and the laborer who had the immediate charge of the grinding having sworn that no mixture was made except what was accidental.

It was likewise contended, that supposing the facts to be as the evidence on the part of the government tended to prove them, the case made out was not larceny, but only a breach of trust, or at most a fraud, with which the prisoner was not charged in the indictment. On this point the jury were instructed, that if they were satisfied from the evidence, that the prisoner had taken from the parcel of barilla any quantity with a view to convert it to his own use, introducing into the mass an article of inferior value for the purpose of concealing the fraud, he was guilty of larceny.

The jury having found a verdict against the prisoner, he moved for a new trial on account of these directions of the judge.

*Rand* and *Hooper*, for the prisoner, argued, that the government should have shown a good reason for not calling the truckman, before it could resort to evidence of an inferior nature. Common-

wealth v. Kinison, 4 Massachusetts, 646. Williams v. The East India Company, 3 East, 192. No evidence produced was so strong as his testimony would have been. It does not appear that the barilla was not changed by him.

PUTMAN J. Suppose he had changed it, could he be made to testify his own fraud?

The government might have produced him, and if he had refused to testify, it would have been a strong circumstance in favor of the prisoner.

Admitting the facts to have been duly proved, the question is, whether they constitute larceny, or only a breach of trust, or at most a fraud. The general doctrine is, that where possession is obtained by permission of the owner, without fraud, larceny cannot be committed. Here the prisoner came to the possession of the barilla by the delivery of the owner, upon a contract to grind it for him, and for this purpose he was obliged to separate every part from the rest. There was no possession taken different from that intended to be given. The prisoner has only been guilty of a breach of contract, in not returning the same article that was delivered to him. It is a case where confidence is reposed, and where the party injured has as good a remedy as he ought to have by a civil action, and the interest of the public does not require a prosecution by indictment. To say that the mere separation of part of an article from the rest, by the person to whom the whole control over it is given, shall be larceny, would do away the whole distinction between civil injuries and crimes.

To constitute larceny, there must be a felonious taking. Every larceny, it is said, includes a trespass. We say further, it includes a trespass for which *de bonis asportatis* will lie.

In 13 Ed. IV. fol. 9, a carrier broke open a bale, and so committed a trespass which made it larceny. It would not have been larceny if he had sold the whole bale. This is a nice distinction, and the most reasonable ground of it seems to be that which is assigned in East's Crown Law, that such a possession was not delivered to the carrier as he took, himself. The case did not turn on the point of a separation of part of the goods, but on the point that the goods in the bale were not delivered, and so it is considered by Lord Hale. It is like the case where the key of a room was given to a servant; the articles in the room were not delivered

to him, but the key was given him only, to keep the room. In many cases, things might be given in a bale to a carrier which he would not know of, and which the owner would be unwilling to intrust to him separately.

In *Kelyng*, 35, a man who came to work at the house of a silk throwster stole a part of the silk delivered to him to work. There the owner had never parted with the possession. It appears from *Kelyng* that the case would have been different, if the silk had been delivered to the workman to carry to his own house.

The case in 1 Rolle Ab. 73, pl. 16, is: "If a man says to a miller who keeps a mill, Thou hast stolen three pecks of meal, action lies; for although the corn was delivered him to grind, still if he steals the meal, this is felony, being taken from the residue." It was an action of slander, in which the question of larceny came only incidentally before the court. It might be slander to say a miller dishonestly took meal, whether the taking it would be larceny or not. All the facts are probably not stated. No doubt a miller may be guilty of larceny in taking meal; as suppose the meal had been put into sacks for the owner and the miller took some of it out; this would be larceny. It does not appear that the mill in that case was not a soke mill, to which persons were obliged to carry their corn, and the miller might be said to get it by delivery that was not voluntary.

In the case of *Cartwright v. Green*, 8 Vesey, 405, a person to whom a bureau was delivered to be repaired, discovered money in a secret drawer and embezzled it. This was held to be felony, because having no occasion to break open this drawer, he did what was not warranted by the purpose for which the bureau was delivered.

It was held in *Rex v. Channel*, 2 Strange, 703, that an indictment would not lie against a miller for detaining part of the corn; and *The King v. Haynes*, 4 Maule & Selwyn, 214, is cited in 1 Russell on Crimes, 68, to show that an indictment will not lie against a miller for delivering a mixture of oat and barley meal different from the produce of the barley received by him to be ground, there being neither false tokens nor conspiracy.

The cases before mentioned were those most dwelt upon by the counsel. The following authorities were also cited: Bacon Ab. Felony, C. 2 East P. C. 655, 693. 2 Russell, 1051. 1 Hale P. C.

504, 509. 1 Hawkins P. C. ch. 33. 3 Chetwynd's Burn's Justice, 182, and Peck's Case, Id. 188. 3 Inst. 107. Dalton's Justice, ch. 102. Staunforde P. C. 25. Glanville, lib. 10, ch. 13. Horne's Mirror 242.

The word *barilla* is also unintelligible, being a Spanish word. *Kelp* is the proper word. Bailey's Dictionary. *Barilla* is the plant, and is translated *glasswort* in Baret's Dictionary.

*Morton*, Attorney General. The word *barilla* is used in United States Laws, 14 Congress, 1 Session, ch. 107, § 2.

With respect to the evidence, the same fact may be proved by different modes of evidence in the same kind of cases; for instance, the fact of marriage in *Commonwealth v. Catlin*, 1 Massachusetts, 9, and *Milford v. Worcester*, 7 Massachusetts, 48. The best evidence of which the nature of the case admitted was given, to prove that this very *barilla* was received into the prisoner's custody. He gave a bill for the grinding, and was paid for it. This amounts to a confession of the party.

But the most important question is, whether the facts proved constitute larceny. Where goods are bailed generally, a conversion is only a breach of trust; but where they are bailed for a specific purpose, a conversion of the whole has sometimes been held a felony, and in all cases a conversion of a part is felony. 1 Hale P. C. 504, 505. 1 Hawkins P. C. ch. 34, § 10. 1 Rolle Ab. 73. 4 Bl. Comm. 230. 2 East P. C. 695. The *barilla* was delivered to the prisoner for the purpose of being ground and returned. When he separated part of it in order to retain it, it was felony, according to the case in 8 Vesey, 405, before cited. In the case in *Strange*, the indictment did not allege actual force, and in *Maule & Selwyn*, Lord Ellenborough means only that the offence as there set forth was not indictable. In neither of these two cases did the question of larceny arise.

PUTNAM J. delivered the opinion of the court. The objection which has been made as to the description of the subject-matter of the larceny cannot prevail. It is said that *barilla* is not an English word; and several English dictionaries have been mentioned which do not contain it. But it is found in Rees's Cyclopædia, — in the act of Congress it is mentioned as merchandise to be imported free from duty, — and in Ure's Chemical Dictionary, it is also described

as a term given in commerce to the impure soda imported from Spain, &c.

A more important objection was made; namely, that the best evidence had not been produced, and therefore that the conviction was not warranted. It is said that the truckman who carried the barilla to and from the mill ought to have been produced, to prove that it was not adulterated in the transportation.

The question upon this part of the case is, whether any other evidence would have been equivalent to that which the truckman might be supposed to have given. Of that we have no doubt. The fact to be proved was, that the defendant stole part of the barilla. He is not charged for the fraud of mixing any other substance of inferior value with it, but for a larceny. Now if the defendant had confessed the fact, that would surely have been sufficient evidence. What evidence was in fact produced is not judicially before us; it was sufficient to satisfy the jury, and did not depend upon the evidence which the truckman may have been supposed to have possessed. It is not like the case where a signature is to be proved by a subscribing witness, who might be produced, and who alone knows the fact to be established.

In the case of *Commonwealth v. Kinison*, 4 Massachusetts, 646, to which we have been referred, the fact to be proved was the identity of a counterfeit bill; it had no artificial marks, and had been out of the possession of the witness and in the possession of the magistrate for two or three weeks. The magistrate was not called; and it was held very properly, that, as there were no private or artificial marks on the bill, it was not identified without the testimony of the magistrate. If there had been any artificial marks, to which the witness who was produced could have testified, that would have been sufficient.

In another case cited by the defendant's counsel, *Williams v. The East India Company*, 3 East, 192, the party did not produce the best evidence in his power, and he failed of course to recover. The fact to be proved was, that the defendants had put on board of the plaintiff's ship a quantity of oil and varnish of an inflammable nature, without giving him any notice of it, by reason of which the ship was burnt. Two persons only knew whether notice of the inflammable nature of the varnish was given; namely, the mate who received it, who was dead, and the military conductor who delivered it, and who was alive and in the power of the party to

produce. The evidence to prove that fact (upon which the plaintiff's action depended) arose from the presumption that it was so, because no person who was on board of, or belonged to the ship, had any such notice of the inflammable nature of the material. But that was justly held to be evidence less satisfactory than could be given by the military conductor, who knew certainly how the fact was.

The gist of the prosecution in the case at bar is the stealing, not the adulteration, of the barilla. We think that the objection which has been made upon this point of the cause ought not to prevail.

But the main question still remains to be considered; that is, whether the facts which have been proved will warrant a conviction for larceny.

Before proceeding to that, I would remark that the question has been argued by the counsel for the defendant with great learning and ability, and that we have been much assisted by their researches.

To constitute the crime of larceny, there must be a felonious taking and carrying away of the goods of another. It is supposed to be, *vi et armis, invito domino*. But actual violence is not necessary; fraud may supply the place of force.

The jury have found that the defendant took the goods with an intent to steal them; and the verdict is well warranted, if, at the time the defendant took them, they were not lawfully in his possession with the consent of the owner, according to a subsisting special contract, in consequence of an original delivery obtained without fraud. If that was the case, the inference which the counsel for the defendant drew would follow, that such a taking would not be felony, but a mere breach of trust for which a civil action would lie, but concerning which the public have no right to inquire by indictment.

The counsel for the defendant have referred us to 13 Edw. IV. fol. 9, as the authority upon this point. The case was as follows: A carrier had agreed to carry certain bales of goods which were delivered to him to Southampton, but he carried them to another place, broke open the bales, and took the goods contained in them feloniously, and converted them to his own use. If that were felony or not, was the question. It was first debated in the Star Chamber, where four of the Judges held it to be felony, but for different reasons; and one of the Judges (Brian) strenuously insisted that it was neither felony nor trespass, because the defend-



ant had the possession by a lawful delivery. The Chancellor thought it was felony, and should be determined according to the intent. Molineux thought it might be felony or trespass, according to the intent, and seems to put the case upon the ground of a determination of the contract. "As if he who did the act does not pursue the purpose for which he took the goods; as if a man distrain for damage feasant, or rent arriere, and afterwards sell the goods, or kill the beasts, there is a tort now, where at the beginning it was good. So, although it was lawful to carry the goods *ut supra*, yet as he took the goods to another place afterwards, he has not pursued the original purpose, and so by his own act afterwards it shall be adjudged felony or trespass, according to his intent." Vavisour did not consider it as a bailment, but that the goods were delivered upon a bargain; that his original intent was to steal and not to carry the goods. "His conduct afterwards proves (says Vavisour) that he took them as a felon, and to another intent than to carry," &c. Choke put the case upon the breaking of the bales and taking out the contents. His opinion was, that if the party had sold the entire bales it would not have been felony, "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony.

Afterwards this matter was argued before the Judges in the Exchequer Chamber, and this proposition was held by all (excepting Nedham); namely, "that where goods are delivered to a man, he cannot take them feloniously." Nedham thought that "he might take them feloniously as well as another." Brian still persisted in his opinion, and said that the breaking of the bales did not make it felony. But afterwards the Judges made a report to the Chancellor that the opinion of the majority of them was, that it was felony.

I have been thus minute in examining this case, as it is referred to as the foundation upon which many subsequent decisions rest. It will be perceived that here may be found the distinctions which are recognized in the text-books upon this subject. Thus, if the party obtain the delivery of the goods originally without an intent to steal, a subsequent conversion of them to his own use while the contract subsisted would not be felony; but if the original intent was to steal, and the means used to obtain the delivery were merely colorable, a taking under such circumstances would be felony. So if the goods were delivered originally upon a special contract, which is determined by the fraudulent act of him to

whom they were delivered, or by the completion of the contract, a taking *animo furandi* afterwards should be adjudged to be felony.

In the application of these general rules to the cases which arise, *it is obvious that shades of difference, like the colors of the rainbow, so nearly approach each other, as to render it extremely difficult to discriminate them with satisfactory precision.* The humane rule of the law is, that in cases of doubt, the inclination should be in favor of the defendant. The seeming, perhaps real, contradictions to be met with in the English decisions may have been influenced by the desire to save human life.

The case of *Rex v. Channel*, 2 Strange, 793, cited for the defendant, was an indictment against a miller employed to grind wheat, stating that he with force and arms unlawfully did take and detain part of it. The indictment was held bad upon demurrer. The reasons assigned in the book are, that there was no actual force laid, and that this was a matter of a private nature; but a better reason seems to us to have been, that there was no averment that the defendant took the wheat feloniously.

The case of *The King v. Haynes*, cited for the defendant from 4 Maule & Selwyn, 214, was an indictment for a fraud against a miller for delivering oatmeal and barley, instead of barley, which was sent to be ground. It is not for a felony. The court thought no indictable offence was set forth. The question whether the miller had taken any of the corn which was sent to be ground, with an intent to steal it, was not then under consideration.

In the case at bar, the goods came lawfully into the hands of the defendant by the delivery of the owner. If he is to be convicted, it must be on the ground that he took the goods as a felon after the special contract was determined.

I will refer to some cases which illustrate this point. Thus, in *Rex v. Charlewood*, before Gould J. and Perryn B. 1786, cited in 2 East P. C. 689, reported in 1 Leach C. C. 409, the jury were instructed that if they thought the prisoner performed the journey for which he hired the horse, and returned to London, where, instead of delivering it to the owner, he afterwards converted it to his own use, that might be felony; for, said the court: "The end and purpose of the hiring of the horse would be over."

In *Kelyng*, 35, a silk throwster had men to work in his own house, and delivered silk to one of them to work, and the workman stole away part of it; and it was held to be felony notwith-

standing the delivery. East, in his *Crown Law*, supposes that if the silk had been delivered to be carried to the house of the workman, and he had there converted a part of it to his own use, it could not have been felony; but that as it was to be worked up in the house of the owner, it might be considered as never in fact out of his possession. 2 East P. C. 682, 683. But Kelyng seems to put the case upon the ground of the special contract: "That the silk was delivered to him only to work, and so the entire property remained in the owner."

But whatever may be the true ground of decision in that case, there is a case in 1 Rolle Ab. 73, pl. 16, which is recognized as good law by Hawkins, East, and other writers, which is very applicable to the case at bar. "If a man says to a miller who keeps a corn mill: Thou hast stolen three pecks of meal, an action lies; for although the corn was delivered to him to grind, nevertheless if he steal it, it is felony, being taken from the rest." *Langley v. Bradshawe*, in error, 8 Car. B. R. That decision proceeded upon the ground of a determination of the privity of the bailment. Hawkins observes (bk. 1, ch. 33, § 4) that such possession of a part, distinct from the whole, was gained by wrong, and not delivered by the owner; and also, that it was obtained basely, fraudulently, and clandestinely.

This remark is peculiarly applicable to the case at bar; for there is no evidence that the owner intended to divest himself of his property by the delivering of it to the defendant. The defendant did not pursue the purpose for which it was delivered to him, but separated a part from the rest for his own use, without pretence of title; and by that act the contract was determined. From thenceforward the legal possession was in the owner, and a taking of the part so fraudulently separated from the rest, *animo furandi*, must be considered as larceny.

The taking of the goods, in order to constitute larceny, may be actual or constructive. Actual, where the goods have been actually taken out of the owner's possession, against his will or without his consent, and which requires no comment or illustration. Constructive, where the owner delivers the goods, but either he does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them. As this subject of constructive possession has given rise to nice and intricate distinctions, it is necessary to consider it with some minuteness. The cases decided upon it may be classed under the following heads:—

I. Where, by the delivery, the owner of the goods passes not only the possession, but the right of property also.

II. Where the possession has been obtained *animo furandi*.

III. Where the possession was originally obtained *bonâ fide*, and without a felonious intent.

IV. Where the delivery does not alter the possession in law.

I. As to the cases where, by a delivery of the goods, not only the possession, but the right of property also, passes.

It is clear that no subsequent conversion, by the person in whom the right of property has thus vested, can be construed into larceny, whatever the intent of the party may be. As, for instance, where goods are sold upon credit and delivered, no conversion of them by the vendee can amount to larceny. *Blunt v. The Commonwealth*, 4 Leigh, 689. *Ross v. The People*, 5 Hill (N. Y.) 294. *Mowrey v. Walsh*, 8 Cowen, 238. *Lewer v. The Commonwealth*, 15 Sergeant & Rawle, 93. Where the defendant bought a horse at a fair of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "Very well;" the defendant rode the horse away, and never returned; this was holden to be no larceny, because the property, as well as the possession, was parted with. *Rex v. Harvey*, 1 Leach C. C. 467; 2 East P. C. 669. So where the defendant bought goods, and desired them to be sent to him with a bill and receipt, and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the Judges held that this was not larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. *Rex v. Parkes*, 2 Leach C. C. 614; 2 East P. C. 671. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawner upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was held to be no larceny. *Rex v. Jackson*, 1 Moody C. C. 119. See *Regina v. Bramley*, Leigh & Cave C. C. 21, 26. Where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger upon the credit of the customer; the Judges held that this was not larceny, the owner having parted with his property in the hat. *Rex v. Adams, Russell & Ryan* C. C. 225. So where a woman obtained from the prosecutor, in the name of one of his neighbors, half a guinea's worth of silver, and said that she would return presently with the half guinea, it was held not to be larceny, for the same reason. *Rex v. Coleman*, 2 East P. C. 672. So where A. allowed B. to take a sovereign away to get change for it, and he never returned, this was held no larceny of the sovereign. *Regina v. Thomas*, 9 Carrington & Payne, 741. So where the defendant sent a letter to the prosecutor in the name of another person, requesting a loan of £3 for a few days, and obtained the money accordingly; eleven of the Judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery. *Rex v. Atkinson*, 2 East P. C. 673. So where the defendant obtained goods of a tradesman by means of a forged order from a cus-

tomor. *Regina v. Adams*, 1 Denison C. C. 38. "Where money is obtained by false pretences, not merely the possession of, but the property in, the money is parted with." Mellor J. in *Regina v. Thompson*, Leigh & Cave C. C. at p. 227. *Regina v. Barnes*, 2 Denison C. C. 59. *Regina v. Essex*, Dearsly & Bell C. C. 371. And where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick, one of them won from him the money in question, which he paid, imagining it to have been won fairly; the Judges held that this was no larceny, the prosecutor having parted with his property in the money under an idea that it had been fairly won. *Rex v. Nicholson*, 2 Leach C. C. 610. And obtaining property by fortune-telling, with a promise to return it, is larceny. *Regina v. Bunce*, 1 Foster & Finlason, 523, Channell B. and Crompton J. That is, if the owner parted with the possession of the property, and expected it to be returned. If he did not expect it to be returned, the indictment should charge the obtaining of money by false pretences.

## II. Where the possession of the goods has been obtained *animo furandi*.

Where a man, having the *animus furandi*, obtains, in pursuance thereof, possession of the goods by some trick or artifice, this is considered such a taking, even although there be a delivery in fact, as to constitute larceny. *The State v. Gorman*, 2 Nott & McCord, 90. *Starkie v. The Commonwealth*, 7 Leigh, 752. *The State v. Thurston*, 2 M'Mullan, 382, 395. See *Felter v. The State*, 9 Yerger, 397. This is well illustrated by a case stated by Pollock C. B. in *Regina v. Bramley*, Leigh & Cave C. C. at p. 28: "The produce of a lead mine consists partly of silver and partly of lead; and if a man, professing to take out lead only, were to cover some of the silver with lead, and were to take it out as lead, and pay for it as lead, that would only be a mode of stealing the silver." In *Regina v. Bramley*, the jury found that there was a preconceived plan on the part of the prisoner to get the coal and appropriate it to his own use on paying for it the price of slack only; and the prisoner carried out that plan by covering the coal with slack, and pretending to the clerk at the weighing machine that the cart contained slack only. Under these circumstances the prisoner obtained the possession of the coal only, and not the property in it. He paid some money, but it was for slack, not for soft coal. The case had all the ingredients of larceny. Where the defendant offered to give the prosecutor gold for bank-notes, and upon the prosecutor's laying down some bank-notes for the purpose of having them changed for gold, the defendant took them up, and went away with them, promising to return immediately with the notes, but never in fact returned; Wood B. left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes, and said, that if they were of that opinion, the case clearly amounted to larceny. *Rex v. Oliver*, cited 4 Taunton, 274; 2 Leach C. C. 1072. See *Regina v. Rodway*, 9 Carrington & Payne, 984. Where the defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person with him to his lodgings, he would give him the amount, deducting the discount and commission; a person was sent accordingly, but, upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned; the judge left it to the jury to say

whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it; the jury being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the prisoner, and the Judges afterwards held the conviction to be right. *Rex v. Aickles*, 2 East P. C. 675; 1 Leach C. C. 294. See *Wilson v. The State*, 1 Porter, 118, 126, 127. Where the defendant obtained from a silversmith two cream ewers, in order that the customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not at the time of the delivery intend to charge for either of them until he had ascertained which would be chosen, this was held by Bayley J. to be larceny, because the possession only, and not the right of property, had been parted with; *Rex v. Davenport*, MSS. 1 Archb. Peel's Acts, 5; but if the prisoner had in fact been sent by the customer to the silversmith, the possession would have been in the prisoner, and the subsequent conversion would not have been larceny; and, upon this ground, in a case similarly circumstanced, but in which there was no evidence that the prisoner had not actually been sent for the goods, Patteson J. directed an acquittal; for non constat that the prisoner had not been sent for the goods as she had stated, and had delivered them to the person who sent her. *Rex v. Savage*, 5 Carrington & Payne, 143.

Where the defendant prevailed upon a tradesman to take goods to a particular place, under the pretence that the price would then be paid for them, and afterwards induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price, the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, ab initio, intended to get the goods without paying for them; this was held to be larceny. *Rex v. Campbell*, 1 Moody C. C. 179. See *Ross v. The People*, 5 Hill (N. Y.) 294. So where the defendant induced a tradesman to send his goods by a servant to a particular place, with change for a crown piece, and on the way met the servant, and giving him a counterfeit crown piece, induced him to part with the goods and change, which he had no authority to do without receiving payment; this was held to be larceny. *Rex v. Small*, 8 Carrington & Payne, 46. *Regina v. Webb*, 5 Cox C. C. 154. So where the defendant having bargained for goods, for which by the custom of trade, the price should have been paid before they were taken away, took them away without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession, and dispose of them for his own benefit; this was held to be larceny. *Rex v. Gilbert*, 1 Moody C. C. 185. And where the defendant, intending ab initio to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them, this was held to be larceny. *Rex v. Pratt*, 1 Moody C. C. 250. *Regina v. Cohen*, 2 Denison C. C. 249.

So obtaining money or goods by the practice of ring-dropping (as it is termed), has been held to be larceny. Thus where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt

for £147 for a "rich brilliant diamond ring," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10s. only, and the watch and money were never returned; it was left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion, convicted the defendant. *Rex v. Patch*, 1 Leach C. C. 238. In *Rex v. Moore*, 1 Leach C. C. 314; 2 East P. C. 679, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the Judges, nine of them were of opinion that this practice of ring-dropping amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not. See also *Rex v. Watson*, 2 Leach C. C. 640; 2 East P. C. 680. Where the defendant, in the presence of the prosecutor, picked up a purse containing a watch-chain and two seals, which the defendant and his confederate represented to be gold, and worth £18, and the prosecutor purchased the defendant's share for £7, intending to part with the property in the money as well as the possession of it; Coleridge J. held that this was not larceny. *Regina v. Wilson*, 8 Carrington & Payne, 111. Where the defendants decoyed the prosecutor into a public house, and then introduced the play of cutting, and one of them prevailed on the prosecutor, who did not play on his own account, to cut the cards for him; and then, under the pretence that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained; and which would be a felony, should they find that the money was obtained upon a preconcerted plan to steal it. *Rex v. Horner*, 1 Leach C. C. 270; Caldecott, 295. So where the prosecutor was induced, by a preconcerted plan, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false color of winning the bet, and the jury found that there was; this was held to be larceny; because, at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party really won the wager. *Rex v. Robson, Russell & Ryan* C. C. 413.

Where two men, J. and W., acting in concert, and intending to defraud the prosecutor, entered his shop, and by means of an artifice induced him to draw a check on his banker for £42, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to the prosecutor of 42 sovereigns, and that the prisoner W. was to remain at the shop till they went to and returned from the bank; at the bank, by the prosecutor's desire, and in his presence, the banker handed four £10 notes and two sovereigns to the prisoner

J.; the prosecutor and J. then left the bank together, and while on their way back to the shop, J. absconded with the notes and the two sovereigns, which he and W., who had in the mean time gone off from the shop, appropriated to their own use; this was held to be a larceny by both prisoners of the notes and the two sovereigns, the prosecutor never having parted with the property in and possession of them, and J. having no more than the bare custody of them until the payment to the prosecutor of the 42 sovereigns. *Regina v. Johnson*, 2 Denison C. C. 310; 5 Cox C. C. 372. Where the defendant by false representations induced the prosecutrix to buy from him a dress for 25*s.* promising that if she would do so he would give her another dress worth 12*s.*; then took a guinea from her hand, gave her a dress worth much less than a guinea, and refused to give her the other dress he had promised; this, it being found by the jury that it was part of the defendant's scheme to obtain the money by means of a pretended sale, was held to be larceny. *Regina v. Morgan*, Dearsly C. C. 395; 6 Cox C. C. 408. Where the prisoner went into a shop and asked for change for half a crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown; upon an indictment for stealing the two shillings and sixpence, Parke J. held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *Rex v. Williams*, 6 Carrington & Payne, 390. In these cases the question is, whether the transaction was complete. The distinction is well settled between obtaining a chattel by fraud and stealing a chattel. It is necessary that the transaction should have been complete in order to constitute it a case of fraud; but if it is not complete—if the prosecutor has not parted with the property in the chattel, and the prisoner takes it away with a fraudulent intent—it amounts to larceny. *Regina v. McKale*, 11 Cox C. C. 32, 36; Law Rep. 1 C. C. 125. In this case the transaction was the same as if the prisoner had come into the shop and asked for a sovereign in exchange for 18*s.* in silver and 2*s.* in coppers, and a sovereign had been laid on the counter, and before the prosecutor had had time to count the prisoner's money the prisoner had hurried out of the shop, intentionally leaving something short. There was no complete parting with the property, and the prisoner having carried it away fraudulently, was guilty of larceny.

Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodgings, out of which the defendant chose six pairs, which were laid on the back of a chair; the defendant then sent the prosecutor back to his shop for some articles, and while he was absent, absconded with the stockings; the Judges held, that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. *Rex v. Sharpless*, 1 Leach C. C. 92; 2 East P. C. 675. Where the defendant hired a horse from the prosecutor, on pretence of taking a journey, and it turned out that, instead of going the journey, he sold the horse in Smithfield market on the same day; it was left to the jury to consider, whether he hired the horse for the purpose of stealing it, or whether he hired it really for the purpose of taking the journey, and afterwards changed his intention; and the jury, being of the former opinion, found him guilty; seven of the Judges were afterwards clearly of the opinion that the offence was felony. *Rex v. Pear*, 1 Leach C. C. 212; 2 East P. C. 685. See



*Rex v. Banks, Russell & Ryan* C. C. 441; post p. 198. And the same where the defendant hired the horse in the name of another person. *Rex v. Charlewood*, 1 Leach C. C. 409; 2 East P. C. 689. So, where the defendant hired a post-chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it, twelve months afterwards, as for a larceny, it was held clearly to amount to that offence, although the chaise was not hired for any definite time. *Rex v. Semple*, 1 Leach C. C. 420; 2 East P. C. 691. And see *Regina v. Thompson, Leigh & Cave* C. C. 225; *Regina v. Brown, Dearsly* C. C. 616.

There must however, according to the decision of Tindal C. J. in *Regina v. Brooks*, 8 Carrington & Payne, 295, in order to constitute a larceny by a party to whom the goods have been delivered on hire, be not only an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods by a third party, who however did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed, was held not to amount to such a conversion. But this case has been overruled. *Regina v. Janson*, 4 Cox C. C. 82, by Coleridge J. after consulting Parke B. In *Semple's Case*, supra, the subsequent conversion was presumed from the long lapse of time, and the other circumstances of the case, although the chaise was not proved to have been actually disposed of by the defendant. Where the prisoner went to an inn, on a fair-day, and desired the ostler to bring out his horse, and upon the latter saying he did not know which was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare, which the prisoner attempted to mount but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured; Garrow B. held this to be larceny. *Rex v. Pitman*, 2 Carrington & Payne, 423. If a man, *animo furandi*, sue out a replevin, and by that means obtain the possession of another man's horse, and ride away with it; or by a fraudulent ejectment get possession of another's house, and carry away the goods out of it, he is guilty of larceny. 1 Hale P. C. 507. 1 Hawkins P. C. ch. 83, § 12. 3 Inst. 108. And see *Rex v. Farre, Kelyng*, 43; 2 Leach C. C. 1064 note. Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was holden to be larceny; because the servant had no authority to part with the goods but to the right person. *Rex v. Longstreeth*, 1 Moody C. C. 137. *Commonwealth v. Collins*, 12 Allen, 181. So where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendant by fraud induced the servant to part with the possession of the horse, under color of an exchange for another, intending all the while to steal it, this was holden to be larceny. *Regina v. Sheppard*, 9 Carrington & Payne, 121.

Where the defendant, by artifice, obtained possession of a request-note at the India House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor (to whom he was a perfect stranger), and the chest of tea was thereupon delivered to him; the Judges held this to be larceny, notwithstanding the possession had been obtained by means of a regular request-note

and permit. *Rex v. Hench, Russell & Ryan C. C. 163.* See *Regina v. Robins, Dearsly C. C. 418*; *Regina v. Kay, Dearsly & Bell C. C. 231*; *Commonwealth v. Wilde, 5 Gray, 83.* A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered, to Mr. Heath's; the defendant replied, that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return, to take home to his master; the boy accordingly gave him the parcel; but the parcel he took from him for his master contained nothing but old rags, of no value; the Judges held this to be larceny. *Rex v. Wilkins, 1 Leach C. C. 520*; *2 East P. C. 673.* It must be owned that these last two cases so nearly resemble a few of the latter cases collected under the first head, that the reader will probably feel some difficulty in distinguishing them upon principle. They may be considered as very nearly approaching the boundary which separates the one class of cases from the other. In England, in such cases, it is safer and more prudent to indict the defendant for obtaining goods, &c. by false pretences; by *St. 7 & 8 Geo. IV. ch. 29, § 53*, the punishment is nearly the same as for simple larceny; and if upon an indictment for obtaining goods, &c. by false pretences, it be proved that the defendant obtained the goods, &c. under circumstances which in law amount to larceny, he will not, upon that ground, be entitled to an acquittal.

III. As to the case where the possession of the goods has been obtained *bonâ fide*, without any fraudulent intention in the first instance.

Where goods are delivered to a man upon trust, or taken by him with the owner's consent, he is not guilty of larceny by converting them to his own use. Even if the goods of a husband be taken with the consent or privity of the wife, it is not larceny. *Rex v. Harrison, 1 Leach C. C. 47.* But this principle is qualified by this, that when the wife becomes an adulteress, she determines her quality of wife, and her property in the husband's goods is not recognized. For a discussion of this rule, see *Regina v. Featherstone*, and note, post.

Where the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings: but the next morning she concealed them, and denied having them in her possession; the jury finding that she took them originally merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention till afterwards, the Judges held that it was a mere breach of trust, and not a felony. *Rex v. Leigh, 2 East P. C. 694.* See *Regina v. Riley*, post p. 200. So where a letter directed to J. M. St. Martin's Lane, Birmingham, enclosing a bill of exchange drawn in favor of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's Lane, Birmingham; but in truth the letter was intended for a person of the name of J. M., who resided in New Hall Street; and the prisoner, who from the contents of the letter must have known that it was not intended for him, applied the bill of exchange to his own use; the Judges held that it was no larceny, because, at the time when the letter was delivered to him, the defendant had not the *animus furandi*. *Rex v. Mucklow, 1 Moody C. C. 160.* See *Regina v. Davis, 7 Cox C. C. 104.* If A. lend B. a horse, and he ride away with him, or if I send goods by a carrier, and he carry them away; or if any other bailee convert the

goods bailed to his own use, it is not larceny; because the original taking was *bonâ fide*, and without fraud. 1 Hale P. C. 504. 1 Hawkins P. C. ch. 33, § 2. Crompton J. in *Regina v. Hassall*, Leigh & Cave C. C. at p. 61.<sup>1</sup> So long as he is a bailee he cannot be guilty of a trespass in taking the goods. A stranger, however, may be so convicted; and the property may be laid either in the bailor or bailee. Williams J. in *Regina v. Robson*, Leigh & Cave C. C. at p. 96. If A. *bonâ fide* hire a horse for a particular purpose, and after that purpose is accomplished, sell the horse, it is no larceny; for unless he had an original felonious intention, the subsequent withholding or disposing of the horse does not constitute a new felonious taking. *Rex v. Banks*, Russell & Ryan C. C. 441, overruling *Rex v. Tunnard*, 2 East P. C. 687. So if A. deliver to B. a watch to be repaired, and B. sell it, it is not larceny, because it was delivered voluntarily, and not obtained *animo furandi*. *Rex v. Levy*, 4 Carrington & Payne, 241. *Regina v. Thistle*, 1 Denison C. C. 502; 2 Carrington & Kirwan, 842; Temple & Mew C. C. 204. So if A. deliver to B. a horse to be agisted, and B. sell it, this is no larceny. *Rex v. C. Smith*, 1 Moody C. C. 473. So where a letter-carrier between A. and B. was intrusted at A. with a directed envelope and a £5 note, to deliver to the postmaster at B., in order that he might make out a money order for £5, and send it in the envelope according to the direction, and on the road the defendant appropriated the note, this was held not to be larceny, the jury finding that he had no intention of stealing the note when it was given to him at A. *Regina v. Glass*, 1 Denison C. C. 215; 2 Carrington & Kirwan, 395. So where the defendant had assigned his goods by deed to trustees for the benefit of his creditors, remaining in actual possession thereof, and he removed them in order to deprive the creditors of them; for he was in lawful possession of them notwithstanding the assignment. *Regina v. Pratt*, Dearsly C. C. 360; 6 Cox C. C. 373.

But this rule can only obtain in cases in which the possession is obtained *bonâ fide* in the first instance; for if A. obtain goods *animo furandi*, or receive them, harboring at the time an intention wrongfully to convert them to his own use, it is larceny. Thus where the defendant was employed to drive sheep to a fair, but, instead of driving them to the fair, he drove them in a contrary direction, and sold ten of them on the morning he received them; the jury were of opinion, that, at the time he received them, he intended to convert them to his own use; this was held to be larceny. *Rex v. Stock*, 1 Moody C. C. 87. *The State v. Thurston*, 2 M'Mullan, 382, 395, 396. See *Rex v. M'Namee*, 1 Moody C. C. 368; *Regina v. Goodbody*, 8 Carrington & Payne, 665; *Regina v. Harvey*, 9 Carrington & Payne, 353; *Regina v. Evans*, Carrington & Marshman, 632. See *Regina v. Hey*, 1 Denison C. C. 601; 2 Carrington & Kirwan, 983; post p. 202.

This rule also applies only while the contract of bailment continues; for if that be determined, and the conversion take place afterwards, it will amount to larceny. As, for instance, if a carrier take goods to the place appointed, and afterwards take them away and convert them, it will amount to larceny. 3

<sup>1</sup> In this case at pp. 62, 63, Cockburn C. J. defined the word "bailment" to mean, in its legal acceptation, a deposit of an article to be returned in specie, or something into which it has been converted in accordance with the terms of the bailment, and does not apply to the receipt of money with an obligation to return the amount, where there is no obligation to return the identical coin.

Inst. 107. See *Regina v. Stear*, 1 Denison C. C. 349; 2 Carrington & Kirwan, 988; *Temple & Mew* C. C. 11. So the contract may be determined before its regular completion, by the tortious act of the bailee. Thus if a carrier open a bale or pack of goods, or pierce a vessel of wine and take away *part* thereof, he is guilty of larceny; 3 Inst. 107; 1 Hale P. C. 105; for by this tortious act the contract of bailment is determined.<sup>1</sup> And see Kelyng, 82, 83. Where forty bags of wheat were sent, for safe custody, to a warehouseman, who emptied several of the sacks, sold the wheat, and substituted other wheat of inferior quality, the Judges were unanimously of opinion, that the taking of the whole of the wheat out of one sack was as much a larceny as the taking a part merely. *Rex v. Brazier, Russell & Ryan* C. C. 337. And where a servant of a common carrier who was intrusted with several packages to be carried, abstracted an entire package, this was held to amount to a breaking of bulk sufficient to determine the bailment, and to constitute larceny. *Commonwealth v. Brown*, 4 Massachusetts, 580. See *Dame v. Baldwin*, 8 Massachusetts, 518. Where a captain, in whose ship several casks of butter were stowed, the principal number being in the hold battened down, but some were on deck, being driven into port by stress of weather, sold, as his own, some of the casks which were on deck,

<sup>1</sup> But if he sells the *entire* package, in its original state, without any other act, although the privity of contract is thereby determined, he is not guilty of larceny. This distinction, although at first it appears absurd, is well settled, and not now to be questioned. In Starkie on Evidence (Vol. III. p. 448 note) this principle is thus stated in the usual lucid and elegant style of that author. "The distinction which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may, at first sight, appear somewhat paradoxical and unreasonable, that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be well warranted, when it is considered how necessary it is to preserve the limits which separate the offence of larceny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit; and that the distinction results from a strict application of the rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, so would every other bailee or trustee, and the offence of larceny would be confounded with that of a mere breach of trust, and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larceny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier, being inconsistent with the object of the bailment, determines the privity of contract; but then the question arises, what caption and asportation constitute the larceny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient; and the act of conversion itself, such as the delivery of the whole of the entire package to a purchaser, is insufficient because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or, as it seems, of the whole of the goods, is a complete larceny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated. 1 Hale P. C. 504, 505. 2 East P. C. 697. Kelyng C. J. explains it upon the ground of a presumed previous felonious intention on the part of a carrier, when he first took the goods; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package." And see *Lewer v. The Commonwealth*, 15 Sergeant & Rawle, 93, 97.

and, upon arriving at his destination, told the consignee that the casks had been thrown overboard, the Judges held this to be no larceny; but it seemed to be admitted, that if the defendant had broken bulk by taking the casks from the hold, it would have been otherwise. *Rex v. Madox*, Russell & Ryan C. C. 92. So where the defendant, a carrier, was employed by the prosecutor to carry a cargo of coals from a ship to a coal-yard, and thence to another yard belonging to the prosecutor; and the defendant carted the coals to the first-mentioned yard, and was engaged several days in carting them from thence to the prosecutor's yard, in the course of which he fraudulently misdelivered two cart-loads of them, it was held that he could not be convicted of larceny, there being no breaking of bulk or other determination of the bailment. *Regina v. Cornish*, Dearsly C. C. 425; 6 Cox C. C. 432. A. the owner of a boat, was employed by B. the captain of a ship, to carry a number of staves ashore in his boat; but B.'s men were put in the boat, but were under the control of A. who did not deliver all the staves, but carried one to the house of his mother, and it was held by Patteson J. that this amounted to a bailment to A. so as to excuse him of the larceny if he had not delivered any of the staves, but that the separation of one staff with intent to convert it to his own use was a breaking of bulk, and so amounted to larceny. *Rex v. Howell*, 7 Carrington & Payne, 325. So where a person not being the servant of the prosecutor, received from him a parcel containing notes, to take to a coach-office, and on the way he abstracted the notes, and applied them to his own use, he was held guilty of larceny. *Regina v. Jenkins*, 9 Carrington & Payne, 38. So where a person intrusted with a parcel of clothes for sale, the price being fixed to each; pawned some, and fraudulently appropriated the rest, such appropriation was held to be larceny. *Regina v. Poyser*, 2 Denison C. C. 233; 5 Cox C. C. 241. If he who is employed to carry goods for hire, appropriate them to his own use without breaking bulk, it is no larceny, even though he be not a common carrier, but be employed in the particular instance only. *Rex v. Fletcher*, 4 Carrington & Payne, 545. *Rex v. Pratley*, 5 Carrington & Payne, 533. It must be carefully observed, however, that the rule which we have now been considering, applies only where the goods were in the first instance obtained *rightfully* as well as without the animus furandi. For even though they were obtained in the first instance without a *felonious* intent, yet if the possession of them was obtained by a *trespass*, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, will be a larceny. As where a man driving a flock of sheep from a field, drove with them a sheep belonging to another person, without knowing that he had done so, but afterwards, when he discovered the fact, sold that sheep and appropriated the proceeds of the sale to his own use, he was held to be convicted rightly of larceny. *Regina v. Riley*, Dearsly C. C. 149; 6 Cox C. C. 88. *Commonwealth v. White*, 11 Cushing, 483.

IV. As to cases, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him.

If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law; 1 Hale P. C. 506; because the goods, at the time they are taken, are deemed in law to be in the possession of the master,

the possession of the servant in such a case being the possession of the master. *The People v. Call*, 1 Denio, 120. *The State v. Self*, 1 Bay, 242. *The United States v. Clew*, 4 Washington, 700. Where a person employed to drive cattle, or to take them to a particular place for a special purpose, and bring them back, sells them, it is larceny; for he has the custody merely, and not the right to the possession; *Rex v. M'Namee*, 1 Moody C. C. 361; although the intention to convert them was not conceived until after they were delivered to him. *Regina v. Harvey*, 9 Carrington & Payne, 353. *Regina v. Jackson*, 2 Moody C. C. 32. See *Regina v. Goode*, Carrington & Marshman, 582; *Regina v. C. Jones*, Id. 611; *Regina v. Francis Smith*, 1 Carrington & Kirwan, 423. Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, it was held to be felony. *Rex v. Robinson*, 2 East P. C. 565. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them, the Judges held this to be felony. *Rex v. Bass*, 2 East P. C. 566. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the daytime, received from his master a bill of exchange, with directions to send it enclosed in a letter to J. S. in London; the defendant absconded with the bill; and the Judges held this to be felony. *Rex v. Paradise*, 2 East P. C. 565. So if money, or a valuable security (as a check drawn by the prosecutor on a banker, *Regina v. Heath*, 2 Moody C. C. 33) be given by a master to his servant to carry to another, or to purchase goods with, and the servant apply it to his own use, it is larceny. *Rex v. Lavender*, 2 East P. C. ch. 16, § 15, p. 566, twice considered by the Judges. *Regina v. Beaman*, Carrington & Marshman, 595. So if a man having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman embezzle a part of it, this is larceny. *Rex v. Abrahams*, 2 Leach C. C. 824. *Rex v. Spear*, 2 Leach C. C. 825; 2 East P. C. 568. *Regina v. Reed*, Dearsly C. C. 257, 263, 264. So where the servant of a master carman, employed to cart goods, by collusion with others suffered the goods, with the cart, to be taken away, it was held to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner. *Rex v. Harding*, Russell & Ryan C. C. 125. So where a servant got ten guineas from her master, in order to get silver for them, and instead of doing so, ran away with the guineas, it was holden to be larceny. *Rex v. Atkinson*, 1 Leach C. C. 302. Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange, undorsed, got it discounted, and absconded with the produce of it, it was held to be felony. *Rex v. Chipchase*, 2 Leach C. C. 699; and see *Rex v. Murray*, 1 Leach C. C. 344. Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's check for the sum thus falsely placed to his credit, and paid the amount of the check to himself by certain bank-notes, entering the payment in the book as being made to "a man;" this was held by the Judges to be a larceny of the bank-notes. *Rex v. Hammon*, Russell & Ryan C. C. 221; 2 Leach C. C. 1083; 4 Taunton, 304. So if a sheriff's officer clandestinely sell, for his own use, part of the goods which he had seized under a fieri facias, he is guilty of larceny, because he has the custody of the goods merely, like a servant, and has

not the legal possession. *Rex v. Eastall*, 3 Russell on Crimes, 382. 4th ed. But where A. employed B. who was by business a drover, to drive pigs and deliver them to C. at L.; he was to be paid by the day, but, by the usage of the trade, he had a right to drive other persons' pigs to L. along with A.'s, if he chose; he drove the pigs to L. and as C.'s wife would not receive them, he took them to L. market, sold them, and absconded; this was held no larceny, as under the circumstances B. was a bailee and not a servant, and he had no original intention of stealing the pigs. *Regina v. Hey*, 1 Denison C. C. 602; 2 Carrington & Kirwan, 983; Temple & Mew C. C. 209, doubting *Rex v. M'Namee*, 1 Moody C. C. 368. See *Regina v. Gibbs*, Dearsly C. C. 445; 6 Cox C. C. 455.

An unauthorized gift by the servant of his master's goods is as much a felony as if he sold or pawned them. *Regina v. White*, 9 Carrington & Payne, 344. And where a third party receives goods from a servant, under color of a pretended sale, knowing that the servant has no authority to sell them, and is in fact defrauding his master, this is larceny in both. *Regina v. Hornby*, 1 Carrington & Kirwan, 305.

But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this is held to be no larceny at common law. 2 East P. C. 568. *Commonwealth v. King*, 9 Cushing, 284. Therefore, if a shopman receive money from a customer of his master, and instead of putting it into the till, secretes it; *Rex v. Bull*, cited 2 Leach C. C. 841; or, if a banker's clerk receive money at the counter, and instead of putting it into the proper drawer, purloin it; *Rex v. Bazeley*, 2 Leach C. C. 835, or receive a bond for the purpose of being deposited in the bank, and instead of depositing it, convert it to his own use; *Rex v. Waite*, 1 Leach C. C. 28; 2 East P. C. 570; in these cases, it has been held, that the clerk or shopman is not guilty of larceny. So where a servant was sent by his master to get silver for a £5 note, which he did, and absconded with the silver, it was held no larceny, because the silver had never been in the possession of his master, except by the hands of the servant. *Rex v. Sullens*, 1 Moody C. C. 129. And where the prosecutor, having employed the defendant to purchase Exchequer bills for him, gave him a check upon his bankers for the amount, and the defendant received the amount of the check in bank-notes, and absconded, it was held not to amount to a larceny of the notes, because the prosecutor never had possession of them except by the hands of the defendant. *Rex v. Walsh*, Russell & Ryan C. C. 218. *Commonwealth v. King*, 9 Cushing, 284. What is a sufficient delivery to the master for this purpose must depend upon the nature of the goods. Thus the putting down, by the servant, of a load of hay, which the master had sent him for, at the master's stable door, was held a sufficient delivery to the master to make the servant guilty of larceny in then appropriating a part of it to his own use. *Regina v. Hayward*, 1 Carrington & Kirwan, 508. There is a distinction between servants and bailees, noticed in the text, ante pp. 189, 190, which it may be necessary to mention in this place; if, for instance, a weaver or silk throwster deliver yarn or silk to be wrought by his journeymen in his house, and they carry it away, and convert it to their own use, this is larceny; but if to be wrought out of the house, it is not; for the journeymen in that case are considered bailees, not servants. See 2 East P. C. 682, 683.

If the owner of goods deliver them to another, *but be present all the time they are in the other's possession*, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them make away with them and convert them to his own use, he will be guilty of larceny. 2 East P. C. 683, 684. 1 Hawkins P. C. ch. 33, § 2. As, for instance, if the owner give the goods to a man to carry, and accompany him at the same time, if the man run away with the goods, he is clearly guilty of larceny. A. was desirous of taking a railway ticket, but being unable to get near to the pay-place owing to the crowd, she gave a sovereign to B. who was close to the pay-place, to take a ticket for her. B. ran away with the money. The jury found that B. placed himself near the pay-place for the purpose of being intrusted with money to get tickets and of converting such money to his own use. *Held*, that he was rightly convicted of larceny. Wightman J. "The true doctrine is that, if the owner delivers a chattel to another for a temporary purpose, and himself continues present during the whole time, the other has only the custody of the chattel, and not the possession of it, and, if he converts it to his own use, may be convicted of larceny at common law." Williams J. "I do not think that, under the circumstances of this case, the actual presence of the prosecutrix during the whole time was necessary. I am of opinion that it would have made no difference in this case if she had withdrawn for a short time." *Regina v. Thompson*, Leigh & Cave C. C. 225; 9 Cox C. C. 244. "The true distinction," said Hoar J., "upon principle and authority, is that if the owner puts his property into the hands of another, to use it or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, *animo furandi*, is larceny. Thus in *The People v. Call*, 1 Denio, 120, the defendant took a promissory note to indorse a payment of interest upon it, in the presence of the owner of the note, and then carried it off, and it was held that he was rightly convicted of larceny, although he might have first formed the intention of appropriating it after it was put in his hands. So where a shopman placed some clothing in the hands of a customer, but did not consent that he should take it away from the shop till he should have made a bargain with the owner, who was in another part of the shop, his carrying it off was held to be larceny. *Commonwealth v. Wilde*, 5 Gray, 83. In all such cases the temporary custody for the owner's purposes, and in his presence, is only the charge or custody of an agent or servant; gives no right of control against the owner; and the owner's possession is unchanged." *Commonwealth v. O'Malley*, 97 Massachusetts, at pp. 586, 587. In this case B. was indicted for embezzlement. A. agreed to lend B. a certain sum of money, and handed to him money to a larger amount to count in D.'s presence, and take therefrom the sum agreed to be lent. B., after counting the money, refused on demand to return any of it to A. and carried it all away. The court were of opinion that there was no evidence to sustain the indictment for embezzlement.

If a man have a bare use of the goods of another, this does not divest the owner of the possession in law; and if the person who thus has the use of them, fraudulently convert them, it is larceny. As, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 Hale P. C. 506. 1 Hawkins P. C. ch. 33, § 6.



It may be necessary to add, that although the taking must, in strictness, be invito domino, yet, where a servant, being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come; it was held that this conduct of the master was no defence to an indictment against the robbers. *Rex v. Eggington*, 2 Bosanquet & Puller, 508; 2 East P. C. 494; 2 Leach C. C. 913. See *Regina v. Williams*, 1 Carrington & Kirwan, 195.

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### REGINA v. HILL.<sup>1</sup>

May 3, 1851.

#### *Monomaniac — Competency as a Witness — Question of Competency to be decided by the Court.*

Where an objection is raised to the competency of a witness on the ground that he is insane, it is for the court to decide whether such person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and, in order to determine these questions, he may be examined and cross-examined, and witnesses on both sides may be examined, in order to found and to meet the objection to his competency, before he himself is sworn.

The question is, was the witness non compos mentis quoad hoc, or non compos mentis altogether. **ALDERSON B.**

If the court decides that he is a competent witness, it is for the jury to determine whether his testimony is affected by his insanity, and what degree of weight is to be attached to it.

In this case the prisoner had been tried before Coleridge J. at the February session of the Central Criminal Court, and convicted of the manslaughter of Moses James Barnes, subject to the opinion of the Judges upon a point reserved at the trial. The case was thus stated by the learned judge: —

This prisoner was tried before me, assisted by my brother Cresswell, at the last February sittings of the Central Criminal Court, for the manslaughter of Moses James Barnes. He was convicted, but a question was reserved for the opinion of the Court of Appeal, as to the propriety of having admitted a witness of the name of Richard Donelly, on the part of the prosecution.

The deceased and the witness were both lunatic patients in Mr.

<sup>1</sup> 15 Jurist, 470. 5 Cox C. C. 259. 2 Denison C. C. 254. 4 New Sessions Cases, 613.

Armstrong's asylum, at Camberwell, at the time of the supposed injury, and they were, at that time, placed in a ward called the infirmary. It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients, of whom the witness, Donelly, was one.

It was opened, for the prosecution, that the witness Donelly was to be called ; and, therefore, on both sides some evidence was gone into in the course of the case, and before he was called, in order to found and to meet the objection to his competency. Muncaster, who had been an attendant in charge of the infirmary ward before the prisoner, stated thus : " Donelly labors under the delusion that he has a number of spirits about him, which are continually talking to him ; that is his only delusion ; he has never been free from it, to my knowledge, since I have known him." Joseph Stuart Burton, the medical superintendent, stated the same, but added : " I believe him to be quite capable of giving an account of any transaction that happened before his eyes. I have always found him so ; it is solely with reference to the delusion about the spirits, that I attribute to him being a lunatic. When I have had conversation with him on ordinary subjects, I have found him perfectly rational ; but for his delusion, I have seen nothing in his conduct or demeanor in answering questions, otherwise than the demeanor of a sane man."

James Hill, a Doctor in Medicine, who had been formerly medical superintendent at the same asylum, stated : " The memory of an insane man is not necessarily affected ; it frequently is, but frequently is not. I have seen Dr. Haslam's work. I do not agree with his remark that memory appears to be perfectly defective in all cases of insanity ; certainly not ; it may probably be so in the generality of cases. Madness is commonly accompanied by a great deal of excitability of the brain ; but in some cases it is not. It is very often accompanied by physical irritation of the brain. That is one of the most common causes of madness, either primarily or secondarily. In certain cases of acute madness, the ideas in the mind of a madman succeed each other more rapidly than in the mind of a sane man, and in a more confused manner ; that is, where there is actual irritation of the brain. It is quite possible for a man to entertain a delusion on one subject, without its affecting his mind generally on other subjects. In most cases

where a delusion prevails, and the man is mad, the rest of his mind is affected to some extent. I agree with Dr. Pritchard that, in monomania, the mind is unsound; but unsound on one point only. There is no doubt however that all the mental faculties are more or less affected; but the affection is more strongly manifested in some than in others. It is difficult to ascertain, without strict inquiry, the extent of a madman's delusions; they have sometimes the power of concealing their delusions even from their medical attendants, especially after having been frequently conversed with about the delusion, and knowing that the delusions are the cause of their detention; but it is unfrequent. It is a doubtful point whether what they say is not for a particular purpose; for instance, to obtain liberty. If a madman has an object to answer, he is sometimes capable of concealing his delusions. I have known it, but not as a general rule. They are, probably, capable of a good deal of dissimulation; many are, I know, but many do not exhibit that tendency. It is common for a certain class of madmen to exhibit a great deal of cunning. Donnelly labors under a delusion with respect to spirits. He is, in the strict sense of the word, a lunatic; inasmuch as he labors under a delusion; he is not excitable by any means. I have known instances of lunatics concealing their delusions; but in all these cases there is an evident and apparent motive. I have known decided lunatics (not monomaniacs), in what are called lucid intervals, capable of going about and managing their own affairs; in ordinary cases, there is no particular difference between a monomaniac, apart from his particular delusion, and an insane person in a lucid interval. In the instance of a monomaniac, you produce the insanity the moment you touch the particular chord; it is possible that you might revive insanity in a madman, during a lucid interval, by touching on the same subject, if it is but recent. I always found Donnelly perfectly rational except on the subject of his particular delusion."

Donnelly was then called, and, before being sworn, was examined by the prisoner's counsel. He said: "I am fully aware I have a spirit, and 20,000 of them; they are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics; all are now in my body and

round my head; they speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not. Satan lives after my death and so does the living God." After more of this kind, he added: "they speak to me instantly; they are speaking to me now; they are not separate from me; they are round me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot. I go to the grave; they live hereafter; I do not, unless, indeed, I've a gift different from my father and mother that I don't know. After death, my spirit will ascend to heaven or remain in purgatory. I can prove purgatory. I am a Roman Catholic. I attended Moorfields, Chelsea chapel, and many other chapels round London. I believe purgatory; I am taught that in my childhood and infancy. I know what it is to take an oath. My catechism, taught me from my infancy, tells me when it is lawful to swear; it is when God's honor, our own or our neighbor's good require it. When man swears, he does it in justifying his neighbor, on a prayer-book or obligation. My ability evades me while I am speaking, for the spirit ascends to my head. When I swear I appeal to the Almighty. It is perjury, the breaking of a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity."

He was then sworn, and gave a perfectly collected and rational account of a transaction which he reported himself to have witnessed. He was in some doubt as to the day of the week on which it took place, and, on cross-examination, said: "These creatures insist upon it it was Tuesday night, and I think it was Monday;" whereupon he was asked: "Is what you have told us what the spirits told you, or what you recollected without the spirits?" and he said: "No; the spirits assist me in speaking of the date. I thought it was Monday, and they told me it was Christmas Eve, Tuesday; but I was an eye-witness, an ocular witness to the fall to the ground."

The question for the opinion of the court is, whether this witness was competent. Sentence has not been passed, but is postponed until this question has been decided; and the prisoner remains in custody.

*Collier*, for the prisoner. 1. Donelly was, both at the time

of the occurrence to which he spoke, and at the trial, *non compos mentis*, in the legal, medical, and ordinary sense of the term. He was a pauper inmate of a lunatic asylum, into which he could not have been legally admitted without two medical certificates of his being "insane," and a "fit person to be confined," together with an order of justices adjudicating these facts; and if he had been restored to reason he must have been discharged. See *Sts. 8 & 9 Vict. ch. 100*, §§ 45, 76, and *8 & 9 Vict. ch. 126*, § 51. He was declared, by one of the medical witnesses, to be, "in the strict sense of the term, a lunatic," laboring under an insane delusion, from which he was never free, and exhibited the characteristic symptoms of insanity, which are said to be "a confirmed belief in an assumed idea, upon which the patient is always acting, without any apparent bodily disease, to the truth of which he would pertinaciously adhere, in opposition to the plainest evidence of its falsity." *Willis on Mental Derangement*, pp. 20, 21. In *Dew v. Clark*, 3 *Addams*, at p. 90, Sir John Nicholl, says: "The true criterion of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term — namely, delusion. Wherever the patient once conceives something extravagant to exist, which has, still, no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or, at least, of being permanently, reasoned out of that conception; such a patient is said to be under a delusion in a peculiar, half-technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject or subjects, in any degree, is, for that reason, essentially mad or insane on such subject or subjects, in that degree." The same view is adopted by Lord Lyndhurst, in the same case, in 5 *Russell*, 166, 168; by Dr. Guy, in his *Medical Jurisprudence*; and in *Taylor's Medical Jurisprudence*, 1st edition, 627, where it is said: "In monomania, the mind is unsound; not unsound in one point only, and sound in all other respects, but this unsoundness manifests itself principally with reference to some particular object or person." There may, indeed, be delusions of the senses without insanity; but if the

patient is aware of the delusion, or capable of being persuaded of it, he is not mad. Nor is mere false reasoning necessarily a proof of madness. Locke says, that madmen generally reason correctly, but their premises are false. An insane delusion is a false impression concerning some matter of fact, which is constantly present to the mind, and out of which it is impossible to reason the patient. Nor was Donnelly, at the time of the occurrence, or at the trial, in a lucid interval. He was, in point of fact, a lunatic, without lucid intervals, for a lucid interval is a space of time "in which no symptom of delusion can be called forth." *Wheeler v. Alderson*, 3 Haggard Ecc. Rep. 599, per Sir John Nicholl; and Donnelly never ceased to be under the influence of his delusion. See also Haslam on Madness, 46, 47.

2. The authorities are uniform, that, as a general proposition, a person non compos mentis cannot be examined as a witness, and no qualification is ingrafted upon this proposition by any text-writer. In Comyns's Digest, Testmoigne, A. 1, "Who shall not be a witness," four heads are enumerated. 1. Non compos. 2. Infidel. 3. Person convicted of treason or felony. 4. Any infamous person. To these, interested witnesses might have been added, but all the heads of objection are resolvable into two. 1. That the witness does not know the truth. 2. That he cannot be depended upon to tell it. A person non compos is included under the first head, and it is said in Comyns, "A man of non-sane memory shall not be allowed as a witness, as an idiot, a lunatic during his lunacy; so, one within age of discretion; so, an infant who does not know the nature of an oath; but a lunatic may be a witness in lucidis intervallis. [ALDERSON B. Is not the test of a lunatic's competency the same as that of a child; viz. whether or not he understands the nature of an oath?] That test does not apply to a lunatic, for religious sentiment is compatible with the most morbid imaginations. In the authority cited, the want of knowledge of the nature of an oath is the limit imposed upon the general rule of a child's inadmissibility, but there is no such limitation to the general proposition, "a lunatic is inadmissible." The test is used with reference to a child, because it may fairly be assumed, that, when the intellect of a child is sufficiently developed to apprehend abstract ideas, such as those of right and wrong, the existence of a God and an unseen world, his perceptions are sufficiently accurate, and his memory sufficiently reten-

tive to enable him to know the truth respecting matters which he has seen or heard; nor is there reason for supposing him less capable of giving evidence on one subject than on another; a child whose intellect is so far developed is therefore reasonably considered *compos mentis*; but the lunatic is confessedly *non compos* on one subject, if not more — his perceptions or imagination being false; he therefore, on one subject at least, cannot know the truth. The same principle of exclusion of a lunatic from giving evidence, viz. want of discernment to know the truth, is adopted in *Co. Litt.* 6 b., 247 a., and *Buller N. P.* 232, 233. No case is reported in which it has been expressly decided that a lunatic is not admissible, but there are several in which this has been assumed to be a settled maxim of law. In several cases, a lunatic, for the purposes of testimony, has been spoken of and treated as though he were dead. *Currie v. Child*, 3 *Campbell*, 282. *Adams v. Ker*, *Bosanquet & Puller*, 360. *Bennett v. Taylor*, 9 *Vesey*, 381.

In *Regina v. Eriswell*, 3 *Term R.* 712, where a pauper, who had been examined, afterwards became insane, *Buller J.* said: "I consider the pauper as dead, he being in such a state as renders it impossible to examine him." Therefore, where it is stated generally that a man is insane, it is assumed that he could not have been examined.

**LORD CAMPBELL C. J.** In that case it was assumed, that, owing to the extent of the insanity, the pauper was not in an examinable state.

The question is, in what sense the word insane is there used. If it means only a delusion, they are in your favor. If it means total insanity, they are not.

**ALDERSON B.** The question is, was he *non compos mentis quoad hoc*, or *non compos mentis altogether*?

The same law is laid down with equal generality by Scotch and Irish text writers. *Alison's Practice of the Criminal Law of Scotland*, p. 435, bk. 13, § 395. *Gabbett Crim. Law*, vol. 2, p. 473. The same rule prevails in both the Civil and the Canon Law. *Mascardus de Probationibus Conclusio*, 828, p. 373. *Grotius de Jure Belli ac Pacis*, lib. 2, ch. 13, § 2.

**LORD CAMPBELL C. J.** It is singular, that the Civil Law, which, generally speaking, is a near approach to the perfection of human reason, should be very defective on the subject of evidence.

**COLERIDGE J.** It is impossible to take rules of evidence from the

Canon Law. It is there declared : A judiciis omnibus tanquam minus apti et idonei ad ferendum testimonium, repelluntur furiosi, amentes, itemque *impuberes*, *servi*, perjuri, infames, *excommunicati*. Quin jure decretalium quilibet reus crimina postulatus, etiamsi nondum confessus, convictus, damnatus et notatus infamiâ sit, testimonium dicere prohibetur, exceptis gravioribus criminibus, qualia sunt simoniæ et læsæ majestatis in quibus etiam *infames* testimonium ferunt. Nam testes non tantum infamiâ sed etiam infamiæ suspicione vacare oportet. Institut. J. Devoti, tit. de Probationibus, XIII.

In certis causis testimonium ferre nequeunt feminæ in causis criminalibus; nisi planè alius desit veritatis ostendendæ locus, ac nisi agatur de gravioribus criminibus simoniæ et læsæ majestatis, in quibus etiam minus idonei testes recipiuntur. (Ibid. T. XIV.)

. . . Similiter neque amici testimonium dicunt in causis amicorum. Ibid. T. XV.

The general proposition, that a person non compos mentis is inadmissible as a witness, is not, in any way, qualified by any reported case. Parke B. has indeed referred the court to a case (Morley's Case) in which he admitted as a witness a person who was proved to be, to a certain extent, insane, and, on referring the question to the Judges, they were of opinion that the witness was rightly admitted. That case, however, was not argued, nor was any judgment pronounced.

3. It would be inconvenient, as well upon grounds of public policy as upon other grounds, to introduce a modification of the general rule. Unquestionably, the generality of the rule, which exempts a lunatic from responsibility for criminal acts, has been modified, and the question in each case has been said to be, whether or not he was able to distinguish right from wrong, with reference to the criminal act. But the exemption from responsibility for crimes is founded upon a sense of the injustice of punishing a person for doing that which he does not know to be wrong; a totally different foundation from that of the rule which excludes a lunatic from being a witness; an exception to the one is not therefore necessarily an exception to the other. See *Dew v. Clark*, 3 Addams, 79. It has been laid down generally that a lunatic is incapable of filling any office, of being a member of parliament, trustee, executor, &c.; and his liability on contracts has been limited to those which relate to necessities supplied to him-



self: contracts which must invariably be for his benefit. It cannot be laid down that all lunatics are admissible as witnesses, and yet, if any are admitted, it will be of the utmost difficulty to define the limits of that insanity which shall exclude. Whether the insanity extend to more than one subject, and what is one subject, can scarcely ever be accurately ascertained. If it be said that the test should be, does the insane delusion relate to the subject-matter of the trial? it will be found that that test is wholly inapplicable. The judge cannot know what inquiries may become material in the course of any trial, or how far the inquiries made may affect the mind of the lunatic. Whether or not a witness's mind is unsound, will, in most cases, be ascertainable with no great difficulty, and it is more convenient that, when the fact of lunacy is established, the inquiry should have an end, than that the judge should proceed to investigate whether or not the lunacy is likely to affect something which he cannot know; viz. the evidence which the witness is to give at the trial. Such an investigation into the nature and extent of the mental unsoundness must always be a task of great difficulty, involving a necessarily painful examination in public of the lunatic himself, possibly attended with the consequences of aggravating his malady, and always unsatisfactory, because it is impossible to test his insanity with reference to every subject which may arise. In the present case, the medical evidence clearly proved the lunacy of the witness before he was called, and if the rule contended for had been adopted, he would have been spared the examination upon the subject of his delusions, to which he was necessarily subjected. Again, if a lunatic witness be examined, and his credibility left to the jury, it must be permitted to call any number of witnesses to prove the extent of his lunacy; to be contradicted, possibly, by witnesses to his comparative sanity. Juries have always to decide upon the credibility of witnesses, but their decision on this rests on the demeanor of the witnesses, and the probability of the facts deposed to; nor are witnesses allowed to be called as to the character, habits, or modes of thought of another witness, or asked a question as to his credibility, beyond this, "whether they would believe him upon his oath;" whereas, a conflict of witnesses, as to the extent and nature of the insanity of another witness, would involve the jury in a complicated collateral question, often most difficult to determine.

4. Lastly; assuming that the generality of the rule should be

qualified in any cases, the present case does not fall within any qualification of it. Here the lunatic believed himself at the time of the trial, and frequently, in converse with spirits, who proceeded from his stomach, and sat in his ears, while he was occasionally visited by the spirit of the queen, and of Luther, and others. These spirits spoke to him on the subject of the trial, and differed from him as to the date of the injuries inflicted upon Barnes: a fact material to the inquiry, because part of the evidence against the prisoner was, that several days had elapsed between the commission of the injuries and his communicating them to the medical officer of the asylum, during which it was assumed that he must have become cognizant of them, and would have reported them if he had not been the person who inflicted them. Under these circumstances, there would be no probability of Donelly being convicted of perjury, if any part of his evidence was false; and although he gave answers indicating some notion of the nature of an oath, in the abstract, he was practically not subject to the penalties of perjury — a protection to which the party deposed against is always entitled. It is submitted therefore, upon general principles, as well as upon their application to the particular facts, this conviction has proceeded upon improper evidence.

*Sir F. Thesiger* (with him *Clarkson* and *Bodkin*), for the Crown, was not called upon.

LORD CAMPBELL C. J. I am glad this case has been reserved, for the matter is of great importance, and ought to be decided. However, after a very learned argument, which I have heard with a great deal of pleasure, I entertain no doubt that the rule is as was laid down by Parke B. in the unreported case that has been referred to, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind, and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony. Various authorities have been referred to, which lay down the law, that a person non compos mentis is not an admissible witness. But in what sense is the expression non compos mentis employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion, may

yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration. The just investigation of the truth requires such a course as has been pointed out to be pursued, and in the peculiar circumstances of this case, I should have adopted the course which was taken at the trial. Nothing could be stronger than the language of the medical witnesses in this case, to show that the lunatic might safely be admitted as a witness. It has been contended, that the evidence of every monomaniac must be rejected. But that rule would be found, at times, very inconvenient for the innocent as well as for the guilty. The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest. In a lunatic asylum, the patients are often the only witnesses to outrages upon themselves and others, and there would be impunity for offences committed in such places, if the only persons who can give information were not to be heard.

ALDERSON B. I quite agree that it is for the judge to say whether the person called as a witness understands the sanction of an oath, and for the jury to say whether they believe his evidence. Here the account of the lunatic himself, and the evidence of the medical witnesses, show that he was properly received as a witness.

COLERIDGE J. This is an important case. We have been furnished, during the argument, with rules drawn from the older authorities against the admissibility of a lunatic witness, which are stated without any qualification. It was not necessary for the decision of those cases that the rule should be qualified; and in former times, the question of competency was considered upon much narrower grounds than it is at present, and more in accordance with that of the Civil and Canon laws. The evidence in this case left the matter thus: there was a disease upon the mind of the witness, operating upon particular subjects, of which the transaction of which he came to speak was not one. He was perfectly sane upon all other things than the particular subject of his delusion. As far as memory was concerned, he was in the position of ordinary persons, and upon religious matters he was remarkably

well instructed, so as to understand perfectly the nature and obligation of an oath. If it had appeared, upon his evidence, that his impressions of external objects were so tainted by his delusion that they could not be acted upon, that would have been a ground for the jury to reject or give little effect to his evidence. But this was a matter for them to determine.

PLATT B. concurred.

TALFOURD J. If the proposition, that a person suffering under an insane delusion cannot be a witness, were maintained to the fullest extent, every man subject to the most innocent unreal fancy would be excluded. Martin Luther believed that he had had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine, according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences.

LORD CAMPBELL C. J. The rule which has been contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him.

*Conviction affirmed.*

In *Holcomb v. Holcomb*, 28 Connecticut, 177 (1859), the court say that they were "fully satisfied with the doctrine of *Regina v. Hill*. And in *Kendall v. May*, 10 Allen, at p. 64, this is declared to be the only rational and just rule that can be adopted." Chapman J.: "Insanity exists in various degrees. Modern investigations have shown that it exists much more extensively than was formerly supposed, and that persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge of the nature of an oath and of events that took place in their presence, to make them useful and trustworthy as witnesses. A rigid rule that would exclude the testimony of all such persons as untrustworthy witnesses would not be conformable to facts, and therefore would not be founded in good sense. Nor would such a rule promote justice. It would leave insane persons needlessly unprotected in hospitals and elsewhere, and would deprive the public and individuals of their testimony in cases where it might be important and valuable. In commenting upon such a rule, Talfourd J. remarked that Luther supposed he had conferences with the devil, and Dr. Johnson entertained delusions respecting his mother. Lord Campbell said that Socrates would not have been a witness under it, for he believed that a spirit always haunted him. In the case of *Commonwealth v. Reynolds*, which was an indictment for murder tried in Bristol in 1863, this court admitted an insane person to testify, adopting the principle laid down in *Regina v. Hill*. In *Leonard v. Leonard*, 14 Pickering, 280, it is said that an insane person under guardianship may make a will, if of sufficient capacity. The reason for allowing him to testify, if he understands the

nature of an oath and the facts which he relates, is at least as strong as for allowing him to make a will."

That insanity, idiocy, &c. is good cause for the rejection of a witness, see *Armstrong v. Timmons*, 3 Harrington, 342; *Livingston v. Kiersted*, 10 Johnson, 362; *Evans v. Hittich*, 7 Wheaton, 453. In Vermont, it has been said that the fact of such incompetency must be proved, otherwise than by an examination of the witness himself, and that he is as incompetent to prove or disprove that fact as any other; and it is not error for the court to refuse an examination of such witness on the voir dire, as to his competency. *Robinson v. Dana*, 16 Vermont, 474.

Neither is a person in a state of intoxication a competent witness; and the court may decide from his appearance whether he is in a suitable situation to testify. *Hartford v. Palmer*, 16 Johnson, 142. *Gould v. Crawford*, 2 Barr, 89. See *Gebhart v. Shindle*, 15 Sergeant & Rawle, 235. But a person deaf and dumb may be competent, and may communicate his testimony by signs or by writing. *Commonwealth v. Hill*, 14 Massachusetts, 207. *The State v. De Wolf*, 8 Connecticut, 93. *Snyder v. Nations*, 5 Blackford, 295. *Rex v. Ruston*, 1 Leach C. C. 408. *Rex v. Pollock*, Archbold Crim. Pl. 231. 14th ed.

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### KEIR v. LEEMAN.<sup>1</sup>

Trinity Vacation 1844.

#### *Compounding Offences.*

The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff, and riot, and of an action for wrongful levy under a fi. fa., which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the fi. fa. is altogether invalid, as grounded on an illegal consideration.

Although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial.

ASSUMPSIT. In this case, the Court of Queen's Bench gave judgment for the defendants, upon which judgment the plaintiff brought error in the Exchequer Chamber. The pleadings are here omitted, because a full abstract of them is there given. See post p. 222, et seq.

<sup>1</sup> 6 Queen's Bench, 308.

LORD DENMAN C. J. in this vacation, June 27, delivered the judgment of the court. His lordship, after stating the substance of the declaration, proceeded as follows :

The plea set out the indictment, and averred the illegality of such an agreement. The plaintiff demurred ; and the general doctrine was largely discussed before us.

The principle of law is laid down by Wilmot C. J. in *Collins v. Blantern*, 2 *Wilson*, 341, 349 ; 1 *Smith's Leading Cases*, 154, that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on an unlawful consideration, and void.

On the soundness of this decision, no doubt can be entertained whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion ; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe.

An early case occurs before Lord Talbot, *Johnson v. Ogilby*, 3 *P. Wms.* 277. A bill was filed to compel performance of an agreement to pay money and assign property in consideration, among other things, of dropping an indictment for a cheat of a peculiar character. A female, who had agreed to levy a fine and suffer a recovery of some houses to the use of plaintiff, afterwards pretended that she was married at the time of the agreement, and pleaded her marriage to the bill. The plaintiff then indicted her for a cheat ; and, when the indictment was ready for trial, the parties entered into this compromise. The principal question argued was whether the attorney's signature bound him personally. But the reporter says : "Then the lord chancellor started another point, namely, that this was a criminal prosecution ; and the agreement, being to stifle a criminal prosecution, was therefore not to be executed in equity. To which I answered" (says Mr. Williams), "that it was true, in the case of a prosecution for felony, an agreement to stifle such a prosecution was not lawful ; but where the indictment was for a fraud, and the party wronged by the fraud came to an agreement to be satisfied for such injury (as in conscience he ought to be), this was lawful, matters of fraud being cognizable and relievable as well in equity as at law ; wherefore this objection was no further insisted on."

This reason is not perhaps very satisfactory ; nor did this point apparently receive much consideration. It occurred in 1734 ; *Collins v. Blantern*, 2 *Wilson*, 341, in 1767.

The doctrine was several times discussed before Lord Kenyon.

In Mr. Kyd's Treatise on Awards, two of his decisions are reported. In 1795, an indictment against Lord Falkland, John King, and another (*Rex v. Lord Falkland*, Kyd on Awards, 66, 2d ed.; cited in Watson on Awards, 48 note (1) 2d ed.) for a conspiracy to cheat Mr. Phillips by a false representation of the ownership of certain estates on which he advanced money, and also indictments for perjury, were called on for trial at nisi prius; the defendants were acquitted on the first, and (it should appear) not on the merits; after which an order was made at nisi prius for referring to arbitration all the matters in difference between the prosecutor and the defendants in the said indictments. This was done with the acquiescence of Lord Kenyon. Mr. Kyd remarks on this proceeding as inconsistent with what the same judge had done in *Rex v. Coombs*, 7 Term R. 475, and *Rex v. Rant*, Kyd on Awards, 64, 2d. ed. where cross-bills of indictment for riot and assault had been preferred, and submitted to arbitration; in which case the counsel "had hardly stated the fact of the submission by bond, when the court expressed a considerable degree of surprise that a criminal prosecution should be so submitted; they observed that it was usual indeed in prosecutions of this kind, before a verdict was given, or after verdict of conviction, and before sentence, for the parties to talk together by the recommendation of the court, and if they agreed, the court, set a nominal fine; but the whole was done under the inspection of the court, and *their* sentence formally followed."

In *Fallowes v. Taylor*, 7 Term R. 475, the magistrates had directed prosecutions for a public nuisance in a river; the plaintiff by their order had prepared bills of indictment against the defendant, who, in order to avoid the expense of the indictment, entered into the bond on which the action was brought, to remove the nuisance. Lord Kenyon C. J. and Lawrence J. clearly held this to be a lawful consideration for the bond.

In *Drage v. Ibberson*, 2 Espinasse N. P. C. 643, Lord Kenyon said "that he should adhere to the class of cases which held, that the consideration being the settling of a misdemeanor, might be good in law," and nonsuited the plaintiff, who had brought trover for a promissory note given by himself to compromise a charge. The facts of the case are not very intelligible; but the caution with which that learned judge expressed himself is worthy of observation.

In *Poole v. Bousfield*, 1 Campbell, 55 (1807), an agreement had been executed between the plaintiff and defendant to discharge the latter from liability on a bill of exchange, as an inducement not to move the court for the defendant to answer the matters of an affidavit. Lord Ellenborough held that the agreement was corrupt and invalid, and the plaintiff was entitled to recover that amount.

The case of *Edgcombe v. Rodd*, 5 East, 294 (1804), was very singular in its circumstances. The plaintiff had been charged before justices with a misdemeanor: that of disturbing the religious worship of a dissenting congregation. He sued them for false imprisonment; and they pleaded by way of defence that they had discharged him from the imprisonment, and that the prosecutor had agreed to proceed no further, in satisfaction of that same imprisonment. On argument, this defence was properly held naught; and each of the Judges declares his opinion that the agreement itself was unlawful, as an obstruction to public justice. Le Blanc J. observes: this "was a prosecution for a public misdemeanor, and not for any private injury to the prosecutor."

*Beeley v. Wingfield*, 11 East, 46, was an action on a promissory note for £24 given by a defendant to a parish officer, on whose prosecution he had been convicted at quarter sessions of beating his apprentice. The plaintiff had been bound over to prosecute; and the court considered this security in abatement of the period of defendant's imprisonment for the misdemeanor. The judgment of Lord Ellenborough C. J. is as follows: "There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expenses incurred by them in bringing the defendant to justice. It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears."



I happened to be both at quarter sessions when this note was given, and at the assizes where the case was tried ; and I always felt some doubt whether the proceeding thereby sanctioned was quite correct ; the principle however on which compromise of offences may be lawful, is forcibly laid down with proper limitations. *Kirk v. Strickwood*, 4 Barnewall & Adolphus, 421, is to the same effect.

In *Baker v. Townsend*, 7 Taunton, 422, the Court of Common Pleas held that, after conviction on an indictment for assault committed in relation to claim of right to land, when the defendant was brought up for judgment, the assaults, the costs of the indictment, and the disputed right of possession, and all matters in dispute, might lawfully be referred to arbitration. Gibbs C. J. thus expressed himself : "The parties have referred nothing but what they had a right to refer. They have referred the several assaults ; these may be referred. They have referred the right of possession ; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred."

The last case to be cited is *Elworthy v. Bird*, 2 Simons & Stuart, 372. Sir J. Leach there enforced an agreement for a separation of man and wife under the circumstances, though it embraced also a compromise of indictment for assault. The doctrine was fully discussed ; and the Vice-Chancellor concisely remarks that "all the authorities concur that the policy of the law does permit the compromise of indictments for assault, and such compromises are frequently recommended and approved by the court."

The result of the cases makes it clear that some indictments for misdemeanor may be compromised, and equally so that some cannot. The line will, as we apprehend, be found correctly traced by Gibbs C. J. in the passage just quoted, and by Le Blanc J. in *Edgcombe v. Rodd*, 5 East, 294.

We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action.<sup>1</sup> It is often the only manner

<sup>1</sup> But it seems that this proposition should be limited to the "cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant the rights of the public are also preserved inviolate." Judgment of the Exchequer Chamber, post. For, "when a verdict of guilty is taken, and the court suspend judgment, and

in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

In the present instance, the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise.

The approbation of the judge (whether necessary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly, it cannot make that legal which the law condemns. But, according to this record, the obtaining it was not made a condition of the promise, nor was it in fact obtained till after the agreement made.

So much was said in argument for the purpose of raising a doubt whether the plaintiff was prosecutor of the indictment, and had bound himself to any thing inconsistent with his public duty in withdrawing the prosecution, and forbearing to adduce evidence in support of the indictment, that we ought not to pass it over entirely. The language of the declaration and of the plea however requires only to be read, to show that there is no real doubt on the point.

We think the agreement invalid as founded on an illegal consideration, and that the defendants are entitled to judgment.

*Judgment for Defendants.*

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### KEIR v. LEEMAN.<sup>1</sup>

Trinity Vacation 1846.

### *Compounding Offences.*

In an action of assumpsit, it appeared that plaintiff had indicted several persons for riot and assault upon a constable in the execution of his duty, and upon others aiding him, and for simple assaults; which offences were alleged to have been committed in impeding the execution of a *fi. fa.* issued by plaintiff against the goods of

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allow the questions between the parties to be referred, the matter is very different, for then it is only to enable the court the better to see what sentence ought to be given." *Regina v. Hardey*, 14 Queen's Bench, 529.

<sup>1</sup> 9 Queen's Bench, 371. In the Exchequer Chamber. Error from the Queen's Bench.

one of the persons indicted. Defendants (being third parties), in consideration that plaintiff would, at their request, not further prosecute, promised to pay the balance in the original action remaining unsatisfied; and likewise the costs of the prosecution. Plaintiff, in consideration thereof, with the assent of the judge before whom the prosecution was, at the assizes, forebore to prosecute further.

On demurrer to pleas which set out the indictment, and which, in answer severally to counts charging the different promises, relied upon the illegality of the contract:

*Held*, by the Court of Exchequer Chamber, affirming the judgment of Queen's Bench, That the consideration was unlawful, and that no action could be maintained on any of the promises.

**ASSUMPSIT.** The first count of the declaration stated that, before the making the promise, &c. plaintiff recovered in the Queen's Bench a judgment against George Emmitt, and sued out a *fi. fa.* which was indorsed &c. and delivered, &c.; that the sheriff made his warrant thereon, which was delivered to one George Acton, to be executed, &c.; who thereupon by virtue, &c. entered on a farm, and a messuage and dwelling-house of G. Emmitt, and seized goods and chattels of G. Emmitt, as and for goods and chattels of G. Emmitt, in the said messuage, &c. and divers crops and effects, to wit of G. Emmitt, as and for the crops of G. Emmitt, on the farm; and, Acton being in possession, one William Emmitt, claiming the farm, messuage, dwelling-house, goods and chattels, crops and effects, as his own property, had, with other persons, to wit the said G. Emmitt, W. Ward, J. Atkinson, D. Hodgson, G. Atkinson, and J. Cromack, assaulted Acton, and others his followers and assistants, and forcibly and violently ejected and expelled them from the messuage and dwelling-house and from the possession of divers of the goods and chattels, and kept the same in the dwelling-house, and, by shutting the outer door, excluded Acton from the dwelling-house and from the possession, &c. till Acton, in order to retake possession, had necessarily and unavoidably a little broken the outer door, and thereby had re-entered and taken the goods, &c.: That W. Emmitt commenced an action of trespass in the Queen's Bench against the sheriff and Acton, for the entry and seizing. The declaration then set out the pleadings and issues joined in the action, involving, among other things, the title to the messuage, dwelling-house, goods and chattels: That the issues came on to be tried at the Yorkshire Summer Assizes 1842, when W. Emmitt set up an assignment by G. Emmitt to trustees, and by the trustees to him, W. Emmitt, which assignment the sheriff and Acton insisted upon was fraudulent and void: That a verdict was found for W. Emmitt

on an issue of Not Guilty and for the sheriff and Acton on all the other issues: That the plaintiff had indicted W. Emmitt, G. Emmitt, Ward, J. Atkinson, Hodgson, G. Atkinson and Cromack, "for riotously assembling to disturb the peace, and for assaulting the said G. Acton, and others his followers and assistants, to wit, on the occasion of his, the said G. Acton's, entering the said messuage and dwelling-house, and seizing the said goods and chattels," in execution of the writ and warrant: That the indictment had been found at the Yorkshire Lent Assizes 1842, and stood for trial at the Yorkshire Summer Assizes 1842; and plaintiff, after the verdict in the cause between W. Emmitt and the sheriff and Acton, and before and at the time of the making the promise by the now defendants, after next stated, was "about to proceed further on such indictment," "and to try the same, and to adduce and offer evidence in support thereof:" That, before and at the time of making the promise, &c. the sheriff, and Acton, his bailiff, were and had been, and continued, in possession of the crops, &c. seized by virtue of the execution, &c.; and, subject to the execution and possession thereby, W. Emmitt was and had been and continued in possession of the same; and divers costs and charges had been incurred in the seizing and remaining in possession, &c. and a large balance of the costs and charges, and of the principal money, damages and costs, recovered against G. Emmitt, remained unsatisfied: That the action by W. Emmitt against the sheriff and Acton had been defended in the name of the sheriff and Acton, but under the indemnity and on the retainer and at the costs and expenses of the now plaintiff, and divers costs and charges were due to the attorney about the defence of the suit: That the prosecution and indictment had been preferred and conducted on the retainer, and at the costs and expenses, of the now plaintiff, and divers costs and expenses were due to the attorney; of all which several premises defendants had notice: And thereupon afterwards, to wit 1st September 1842, "in consideration that the prosecutor, to wit the said prosecutor, the now plaintiff, of the indictment, to wit the said indictment against the said G. Emmitt and others, to wit, &c." (naming them), "would, to wit at the request of the defendants, not proceed further in such indictment, and of the sheriff of Yorkshire" (to wit the said, &c.) "withdrawing, to wit by and with the consent and direction of the now plaintiff, at the request of the

now defendants, from the possession, to wit the said possession of the crops and effects, to wit" &c. "that is to say, the said crops and effects so claimed by the said W. Emmitt to be the crops and effects of, and to be so assigned to, the said W. Emmitt as aforesaid, and so in his possession, subject to the said execution as aforesaid, at the farm, to wit," &c. "under the execution, to wit the said execution," &c., "the now defendants undertook and promised the now plaintiff to pay him, on or before the last day of Michaelmas term next thereafter, the balance, to wit the said balance, of the principal money and costs then remaining unsatisfied, to wit the said principal money, damages and costs so recovered by the now plaintiff against the said G. Emmitt as aforesaid, and which then so remained unsatisfied as aforesaid in the original cause, to wit, Keir against Emmitt," &c. (identifying the parties), "and the balance of costs and charges incurred in and about the execution, to wit the said balance of the said costs and charges incurred in and about the said execution of the warrant of fieri facias, to wit" (identifying): Averment "that, confiding in the said promise of the defendants, the prosecutor of the said indictment, to wit the now plaintiff, against G. Emmitt and others, to wit," &c. "for riot and assault, to wit the said riot and assault, did not proceed further on such indictment; and that afterwards, to wit on" &c. "at the said Summer Assizes and Sessions of oyer," &c. "then holden for the county of York, at" &c. "before Thomas Lord Denman," &c. "and Sir William Henry Maule," &c. "the said prosecutor of the said indictment, to wit the now plaintiff, did, by and with the assent of the said George Acton, and his said followers and assistants, so being the person so assaulted as aforesaid, instruct counsel to inform, and by such counsel did inform, the said justices so assigned as aforesaid, in open court, at the said assizes and sessions, of and concerning the premises, and did then and there, by and with the assent and leave of the said court, thereupon forbear to proceed further, and to offer any evidence, upon the said indictment; and thereupon the said persons so indicted, to wit the said G. Emmitt," &c. "were, in due form of law, by a jury of the said county, acquitted of the premises in the said indictment charged upon them;" of which the said defendants afterwards had notice. Averment, that plaintiff, confiding in the said promise, &c. did forthwith afterwards, to wit on, &c. withdraw the said execution, to wit, &c. and

give notice and directions to the sheriff of Yorkshire, and to the said Acton, his bailiff, to withdraw, and the sheriff and his said bailiff immediately did then withdraw from the possession of the said crops and effects; of which defendants afterwards had notice. Averment, that the balance of the principal money, damages and costs, at the time of the promise by the defendants remaining unsatisfied, amounted to a large, &c. to wit £84 12s.; and the balance of the costs and charges incurred in the execution, at the time of the promise remaining unsatisfied, to a large, &c. to wit £63 11s. 11d.; of which defendants afterwards had notice; and, although the last day of the said Michaelmas term hath elapsed, and G. Emmitt did not, before the said last day, &c. or since, pay either of the balances, whereof defendants afterwards had notice, and were requested to pay, defendants have disregarded their said promise, and have not paid either sum.

Plea. That the indictment in the first count mentioned was to the tenor, &c. The plea then set out the indictment, of which the first count charged that the parties indicted, "with force and arms," "unlawfully, riotously, and routously did assemble and gather together, to disturb the peace," of the Queen; "and, being so then and there assembled," &c. "in and upon one Robert Ellison, in the peace," &c. "being, unlawfully, riotously and routously did make an assault, and the said R. Ellison, then and there, unlawfully, riotously and routously did beat, wound, and ill treat, so that his life was greatly despaired of; and other wrongs to the said R. Ellison, then and there, unlawfully, riotously, and routously did, to the great disturbance and terror of the liege," &c; in contempt, &c. to the evil example, &c. and against the peace, &c. The second count charged a riotous, &c. assemblage with force and arms, to wit with sticks, staves, and other offensive weapons, to disturb the peace, &c. and that the parties indicted, being so assembled, &c. armed as last aforesaid, did unlawfully, riotously, and routously made a great noise, riot, and disturbance, and remained and continued armed, &c. making such noise, &c. for the space of one hour, &c. and, being so assembled and gathered, in and upon one George Acton, being an officer of the high sheriff of Yorkshire, then and there being in the due execution of his duty as such officer, did make an assault, and him, so being in the execution, &c. did beat, wound, and ill treat, with intent to

bstruct, resist, and molest him in the execution of his duty as such officer, against the form of the statute, &c. The third count charged an assault upon, and beating, wounding, and ill treating of Acton, then and there acting in aid of a peace officer, to wit in aid of one Robert Chalk, then and there being a constable, and then and there being in the due execution of his duty as such constable, with intent to resist and prevent the lawful apprehension of the parties charged for a certain offence for which they were liable to be apprehended by Chalk and Acton, that is to say, or having unlawfully, riotously, and tumultuously assembled and gathered together to disturb the peace, and assaulted and beaten Ellison and Acton; against the form of the statute, &c. The fourth count charged a riotous assembly, and an assaulting, beating, and wounding of Chalk. The fifth count charged that the parties assembled with sticks, &c. as in the second count, but without stating any assault. The sixth count charged an assault upon, and beating, wounding, and ill treating of Chalk, being a peace officer, to wit a constable, being in the due execution of his duty, against the form of the statute, &c. The seventh count charged an assault upon, and beating, wounding, and ill treating of Chalk, not stating his office or duty, with intent to resist the lawful apprehension, &c. (as in the third count) against the form of the statute, &c. The eighth count charged a riotous assembling and assault upon George Key. The ninth count resembled the fifth. The tenth count charged an assault upon, and beating and wounding of G. Key, acting in aid of a peace officer, to wit, R. Chalk, being a constable in the due execution, &c. contrary to the form of the statute, &c. The eleventh count charged an assault upon, and beating, wounding and ill treating of G. Key, with intent as in the third count, but not mentioning Ellison; against the form of the statute, &c. The twelfth count charged an assault upon, beating, wounding, and ill treating of G. Key, not assigning any special character to him. The thirteenth count charged the same as to R. Chalk. The fourteenth count charged the same as to G. Acton. The fifteenth count charged the same as to R. Ellison. The Plea then continued: "And so the defendants say that the said consideration for the said supposed promise in the said first count mentioned was and is illegal, and such supposed promise was and is, wholly null and void; and this," &c. Verification.

General demurrer. Joinder.

The second count of the declaration resembled the first, except that the promise was laid to be, to pay to the now plaintiff's attorney the costs, as between attorney and client, of the defendants in the suit of W. Emmitt against the sheriff and Acton.

Plea to the second count, corresponding with that to the first count, *mutatis mutandis*.

General demurrer. Joinder.

The third count of the declaration laid the promise to be to pay to the now plaintiff's attorney the costs, as between attorney and client, of the prosecution; and in other respects corresponded with the first two counts.

Plea as before, *mutatis mutandis*.

General demurrer. Joinder.

In Trinity vacation 1844, the Court of Queen's Bench gave judgment for the defendants; upon which judgment the plaintiff brought error in the Exchequer Chamber. Joinder in error.

The case was argued in last Easter vacation, Monday, May 11 1846, before TINDAL C. J., COLTMAN, MAULE, and CRESSWELL JJ. and PARKE, ALDERSON, ROLFE, and PLATT, BB. COLTMAN J. and ALDERSON B. left the court towards the close of the argument for the defendants.

*Bliss* for the plaintiff in error (the plaintiff below). The third count contains only a promise to pay the costs of the prosecution against G. Emmitt and the rest, as between attorney and client. As this narrows the promise, it will be most convenient to apply the argument to the third count. The consideration for the promise there laid is that the plaintiff, being prosecutor, would not proceed further on the indictment; and the question is whether that be an illegal consideration for such a promise.

It is necessary to keep in view the distinction between felonies and misdemeanors, and again the distinction between different kinds of misdemeanor. It may be admitted, for instance, that the abandoning a prosecution for perjury would not be a good consideration for a promise to pay money; that is the doctrine of *Collins v. Blantern*, 2 *Wilson*, 341, 347; see notes to s. c. 1 *Smith's Leading Cases*, 154, 168; also *Ward v. Lloyd*, 6 *Manning & Granger*, 785, which it is not necessary to impeach. But the principle will not apply to a prosecution, by a party assaulted, for the assault, unless it be true that all agreements to abstain from the prosecution of misdemeanor of any kind are illegal; and for this no authority can be ad-



duced, except some dicta at nisi prius. The court below appears to have acted upon a distinction between an indictment for an assault upon the prosecutor, and an indictment for an assault accompanied by riot, made upon peace officers and their assistants. This distinction is not tenable. The indictment furnishes no criterion of the magnitude of the offence; an assault may be as grievous a crime as a riot. Such a distinction probably would never have been suggested before the statutes which gave a particular character to certain assaults by making them felonious. For instance, it could hardly have been contended that, before St. 22 & 23 Car.

... II. ch. 1, § 7, money might not be taken to compromise an indictment for slitting the prosecutor's nose. Whatever distinction exists, can therefore be founded only on the particular facts of the offence. Compounding a felony would be a distinct species of offence; it is so at common law, as theftbote.

TINDAL C. J. In felony there is a forfeiture; that would take away the means of paying compensation.

For felonious acts no action can be brought, unless an action for stolen goods, where the felon has been convicted, be an exception; but many misdemeanors, of which assault is one, may be the subject of either a criminal or a civil proceeding. For these it is reasonable that a compromise should be allowed; and, in fact, it often takes place with the sanction, and indeed at the suggestion both of magistrates and of judges; only nominal damages could be expected in an action after the defendant had been punished upon indictment; and it is not improbable that, if damages were first recovered, the attorney-general would enter a nolle prosequi on the indictment; at any rate, the punishment would be trivial. Before St. 18 Eliz. ch. 5, an informer upon even a penal statute could compromise the information or suit; he may still do so in the case of proceedings before magistrates. *Rex v. Crisp*, 1 Barnewall & Alderson, 282. This statute was not declaratory, but introduced a new principle, as appears from *Williams v. Hedley*, 8 East, 378.

ALDERSON B. Can you suggest the limit between misdemeanors which may, and those which may not, be the subject of a compromise? What would you say to an indictment for a nuisance affecting a whole parish? Could that be referred to arbitration?

It could; and the practice is not uncommon. See *Dobson v. Groves*, and *Regina v. Dobson*, 6 Queen's Bench, 637. The lawful-

ness of compromising indictments for misdemeanors was recognized in *Johnson v. Ogilby*, 3 P. Wms. 277, 279, A. D. 1734, a case of prosecution for fraud; in *Drage v. Ibberson*, 2 Espinasse N. P. C. 643 (1798) also a case of prosecution for fraud, where Lord Kenyon adhered to the distinction suggested in *Johnson v. Ogilby*, 3 P. Wms. 277, 279, between felony and misdemeanor, though *Collins v. Blantern*, 2 Wilson, 341, 347, was cited. In *Rex v. Lord Falkland*, Kyd on Awards, 66, 2d ed.; see *Watson on Arbitration*, p. 60 note 1, 3d ed. (1795) all matters in difference between the prosecutor of some indictments for perjury and the defendants were referred, with the acquiescence of Lord Kenyon. Some doubts have been expressed as to this proceeding, on the ground of its supposed inconsistency with the language of Lord Kenyon himself in *Rex v. Coombs* and *Rex v. Rant*, Kyd on Awards, 64; see *Watson on Arbitration*, 59, 60; but the only doubt was, whether it was not necessary to obtain the leave of the court before a compromise was made between the parties. That admits the principle; and here the leave of the court appears on the record. Mr. Watson's view (on *Arbitration*, p. 59) of the result of all the cases is, "that indictments for assaults, nuisances, &c. may be referred to arbitration, by leave, or by authority of the court where they are depending; but without such permission or authority indictments cannot be referred. In *Collins v. Blantern*, 2 Wilson, 341, 347, the indictment was for perjury; and it was expressly pleaded that the agreement was unlawful. The agreement was, not to give evidence.

ALDERSON B. I do not see how a party could have performed that agreement, if he had been subpœnaed.

Here the agreement is only not to proceed further; it does not appear that the plaintiff is a witness, or bound over; he may be merely a voluntary prosecutor. In *Fallowes v. Taylor*, 7 Term R. 475 (1798), see the judgment of Lawrence J., a party, who had been directed by the magistrates in quarter sessions to prosecute for a public nuisance, and had prepared (but not preferred) bills accordingly, took a bond to himself for £500, conditioned for the removal of the nuisance; and the court held the consideration legal. That case is the stronger, because the plaintiff had not, as here, a personal ground of action for the thing done. *Edgcombe v. Rodd*, 5 East, 294 (1804) is relied upon for the defendants. There an action was brought against magistrates for assault and false imprison-

ment; they pleaded that C. M. had obtained a warrant from them against the plaintiff for a statutable misdemeanor, on which the plaintiff had been committed till the quarter sessions; and that afterwards, before the said sessions, it was agreed by C. M. and the plaintiff, with the consent of the defendants, that C. M. should not further prosecute, and should consent to the plaintiff's discharge at the sessions in full satisfaction and discharge of the assault and imprisonment; that this was done, and the plaintiff accepted the non-prosecution and the discharge at sessions in full satisfaction and discharge of the assault and imprisonment. In another (the third) plea, the previous agreement and consent of the defendants were omitted. Both pleas were held bad on demurrer. There was clearly no satisfaction, because the forbearance of C. M. was only the act of a third party. The remarks which appear to be in favor of the present defendants were extrajudicial. It was said that the agreement was either illegal or no satisfaction; now, as it clearly was no satisfaction, the illegality is not shown by the decision. Lord Ellenborough insists also upon the right of the Crown to the statutable penalty in that case; this ground (if not removed by *Rex v. Crisp*, 1 Barnewall & Alderson, 182) is inapplicable here. Lord Ellenborough's language may be dwelt upon; but, if it be understood in the sense requisite for the defendants, his reasoning goes too great a length; for it would apply to all proceedings which are criminal in form. He did however seem to go as far in *Poole v. Bousfield*, 1 Campbell, 55, (1807) where, at nisi prius, he held that an agreement to discharge from a debt, in consideration of the debtor not moving in court to make the creditor answer the matters of an affidavit, was illegal and void. Probably the reliance will principally be on the language used in *Edgcombe v. Rodd*, 5 East, 303, by Le Blanc J. who said that the prosecution was for a public misdemeanor; that, if the plaintiff had acted illegally, the defendants ought not to have consented to the bargain; if legally, his discharge could be no consideration, and the consent of the defendants was unnecessary. It is clear that this asserts too much. All indictable offences are public; and, if it be sought to distinguish between those cases where an action will lie, and those where it will not, the principle fails; it may well be that the public is more interested in some cases where an action will lie than in some where it will not. A riot or an unlawful assembly may produce injury to

the prosecutor. In *Beeley v. Wingfield*, 11 East, 46 (1809) a party convicted at quarter sessions of a misdemeanor, in ill-treating his parish apprentice, gave the prosecutor, a parish officer, a promissory note to cover part of the expenses of prosecution; in consideration of which the court of quarter sessions passed a sentence lighter than would have been passed otherwise. This court held the consideration for the note to be not illegal. No stress can be laid on the circumstance that the party there had been convicted; it appeared, as a fact, that the payment did interfere with the course of justice; the objection was quite as strong as on the third count in the present case, where the agreement is stated to be for the costs of the prosecution. If such an arrangement is to be permitted at all, it is better that it should be made at an early stage. In *Baker v. Townsend*, 7 Taunton, 422 (1817) a party was convicted at quarter sessions of an assault; and the court respited the judgment, and allowed that, and another alleged assault, and all matters in difference, to be referred; the arbitrator awarded a sum in satisfaction of the assaults, and another in satisfaction of all costs incident to the proceedings; and, debt being brought on the award, the count was held good on demurrer. In a recent case, *Elworthy v. Bird*, 2 Simons & Stuart, 372, an agreement for a separation of husband from wife, though comprehending a compromise of indictments for assault, was enforced in equity. In *Kirk v. Strickwood*, 4 Barnewall & Adolphus, 421, an action was brought on a promissory note given by a party convicted of disobeying an order of maintenance, to cover the amount of maintenance due and costs, sentence having been deferred with a view to the arrangement; and the party, after giving the note, was fined a shilling and discharged. This court, on the authority of *Beeley v. Wingfield*, 11 East, 46, held the action maintainable.

In Comyns on Contracts, p. 24, 2d ed. ch. 2, the rule (8) adopted from Pothier's *Traité des Obligations*, Part I. ch. 1, sect. 1, art. 7, § 98, tome 1, p. 45, ed. 1781, is thus given: "However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of." If therefore there be any state of facts consistent with the record under which the agreement declared upon could be legal, it is not to be gratuitously assumed that the contractors had any thing illegal in view; and then the declaration

is not answered. To the same effect are *Jones v. Waite*, 5 New Cases, 341, in Exchequer Chamber; affirming the judgment of Common Pleas in *Waite v. Jones*, 1 New Cases, 656; judgment of Exchequer Chamber affirmed in Dom. Proc. *Jones v. Waite*, 9 Clark & Finnelly, 101; *Haines v. Busk*, 5 Taunton, 521; *Sewell v. The Royal Exchange Assurance Company*, 4 Taunton, 856; and *Harrington v. Klopogge*, note (a) to *Palmer v. Bate*, 2 Broderip & Bingham, 678; and the principle was taken for granted in *Holland v. Hall*, 1 Barnewall & Alderson, 53. The agreement is, not to proceed further. Now, if the attorney general had entered a *nolle prosequi*, the plaintiff would have necessarily abstained from proceeding; that is the only mode, strictly speaking, of discontinuing an indictment; *Elworthy v. Bird*, 2 Bingham, 258; and, from *Rex v. Fielding*, 2 Burrow, 719, it is probable that the attorney general would have so acted, the plaintiff having received compensation. A similar principle was acted on by Lord Hardwicke in *The Mayor &c. of York v. Pilkington*, 2 Atkyns, 302. Besides, it is not averred here that any public crime had been committed; there is no averment of a riot, or of an assault upon a public officer, in fact. The last four counts of the indictment itself contain no charge of assaulting any public officer, but only G. Key and other individuals; this is therefore quite within the principle of *Harrington v. Klopogge*, 2 Broderip & Bingham, 678, where the agreement was held good for so much as could lawfully be agreed for. Suppose the defendants were innocent; might not the plaintiff abstain from proceeding?

MAULE J. Would that be a good bargain in the case of an indictment for felony?

Cases of felony are distinguished from those of misdemeanor; it will be admitted that in some cases indictments for misdemeanor may be compromised for money.

*Martin*, *contrà*. It appears by the record that the promise here was made in consideration of the plaintiff abandoning a prosecution for assault on persons acting in aid of a peace officer in the execution of his duty; an offence which, by St. 9 Geo. IV. ch. 31, § 25, subjects the offender to two years' imprisonment with hard labor. That is, at any rate, a part of the agreement which is illegal; and, if illegal, it vitiates the whole; as appears by the authorities cited in Mr. Smith's note to *Collins v. Blantern*, 1 Smith's Leading Cases, 169; the judgment of Tindal C. J. in

*Shackell v. Rosier*, 2 New Cases, 634, 646 ; and *Comyns's Digest*, Action upon the Case upon Assumpsit, B 13, F. 4, F. 7. The consent of the court could give no legality to such a contract. It is suggested that a *nolle prosequi* would be a legal mode of putting an end to the indictment ; but, if the prosecutor were to engage, for a payment of money, to obtain the *nolle prosequi*, that could constitute no legal contract. The argument proves too much ; the attorney-general might enter a *nolle prosequi* on an indictment for felony. The cases mentioned in the latter part of the argument on the other side, are inapplicable to the present question. *Holland v. Hall*, 1 Barnewall & Alderson, 53, cited for the plaintiff, is a strong authority against him. There the contract was *primâ facie* illegal, though, if certain other facts had existed, which were not shown either to exist or not to exist, the contract would have been lawful. But the court held it to be illegal ; and Abbott J. said : " If there be, on the face of the agreement, an illegal intention, is it too much to say, that the burden lies on the party who uses expressions *primâ facie* importing an illegal purpose, to show that the intention was legal ? " *Harrington v. Klopprogge*, 2 Broderip & Bingham, 678, decides merely that, where a party agrees to assign any office of which he may become possessed, this will be construed as having in view only assignable offices. *Haines v. Busk*, 5 Taunton, 521, was the case of an action by a broker against his principal for commission ; and the decision was merely that the principal could not set up as a defence that what was done for him by the broker would be illegal unless he, the principal, took certain steps. *Elworthy v. Bird*, 2 Bingham, 258, shows that a discontinuance of an indictment, technically speaking, requires the act of the attorney-general ; under what circumstances this can be the foundation of a contract, is not decided. All that Lord Hardwicke did in *The Mayor &c. of York v. Pilkington*, 2 Atkyns, 302, was to prevent parties who were plaintiffs before him from prosecuting the same matter criminally in a court where they would themselves have been judges. *Rex v. Fielding*, 2 Burrow, 719, shows nothing as to the terms on which a prosecution may be put an end to ; it contains only an intimation that the attorney-general would probably stay it when the prosecutor had commenced a civil action. It is true, as the plaintiff contends, that the declaration is not answered unless the illegality appear plainly ; but it does so here. The question is, not merely whether it be an

offence to forbear prosecuting for a misdemeanor, but whether the law will enforce a contract to pay money for such forbearance. The difficulty of distinguishing between different kinds of misdemeanor has been urged on the other side. There is, no doubt, such a difficulty; and, if the question were quite new, probably the courts would hold it illegal to compromise for money any prosecution whatever. This seems to be the view of Alderson B. in *Garth v. Earnshaw*, 3 Younge & Collyer Eq. Exch. 584. At the utmost, the legality must be confined to cases in which the whole matter of the indictment is such as to admit of satisfaction by a payment to the prosecutor.

As to the cases cited in the earlier part of the argument for the plaintiff. *Rex v. Crisp*, 1 Barnewall & Alderson, 282, was a decision only on the statute 18 Eliz. ch. 5. *Williams v. Hedley*, 8 East, 378, is rather in favor of the defendants; for it was there held that money paid to compromise a prosecution for misdemeanor might be recovered back, the objection being that the person paying was particeps criminis, which the court overruled on the ground that he was not an informer, a plaintiff, or a party suing out process, so as to be within the prohibition of statute 18 Eliz. ch. 5, §§ 3, 4. In *Johnson v. Ogilby*, 3 P. Wms. 279, no more appears than a suggestion of counsel, not expressly adopted by the court; and from Mr. Cox's note (1) there it rather seems that the court disallowed it. In 1 Story's Equity Jurisprudence, pp. 297, 298, § 294 (3rd ed. 1843, Boston) it is said: "Agreements, which are founded upon violations of public trust or confidence, or of the rules, adopted by courts in furtherance of the administration of public justice, are held void." "Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration. They have a manifest tendency to subvert public justice." The report of *Drage v. Ibberson*, in 2 Espinasse N. P. C. 643, is probably incorrect; it states that Lord Kenyon said "he should adhere to the class of cases which held, that the consideration being the settling a misdemeanor, might be good in law;" but there is no such class. The nonsuit in that case may however be supported on another ground; however incorrect the transaction, trover would not lie for the paper on which the note was written, inasmuch as the property was parted with, though the note itself might be one which could not be indorsed. The cases cited from Kyd on Awards seem to suggest a sound limitation; namely, that

no compromise should be allowed except when, there having been a conviction, the court, though it suspends the judgment or inflicts only a nominal punishment, retains in its own hands the control of the proceeding till it comes to its technical close. There seems also to be no objection to parties being bound over not to commit an offence. *Rex v. Lord Falkland*, Kyd on Awards, 66, 2d ed. appears to have been a hasty proceeding, not well considered. *Edgcombe v. Rodd*, 5 East, 294, has not been distinguished; the reasoning of *Le Blanc J.* cannot be answered. It does not appear that in *Fallowes v. Taylor*, 7 Term R. 475, there was more than a bond conditioned to remove the nuisance; no stipulation to abstain from prosecuting appears. It is admitted that *Poole v. Bousfield*, 1 Campbell, 55, is a direct authority for the defendants. *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunton, 422; and *Kirk v. Strickwood*, 4 Barnewall & Adolphus, 421, are explainable on the ground already pointed out; there had been convictions in all those cases. There was also a conviction in *Elworthy v. Bird*, 2 Simons & Stuart, 372; and, besides, the argument there seems to have turned on the distinction between different kinds of assault; it was not suggested that an indictment for a riot or for an assault on a public officer could be compromised. This case therefore must be decided on the principle affirmed in *Collins v. Blantern*, 2 Wilson, 341, 347. It is immaterial whether the defendant was guilty or not; if he was, the prosecution ought not to have been compromised; if he was not, it ought not to have been instituted, or to have been persevered in, and the abandonment of it can be no consideration. The authorities are collected in *Chitty on Contracts*, p. 674, 3d ed.

*Bliss*, in reply. Only one of the indictments in *Elworthy v. Bird*, 2 Simons & Stuart, 72, had been prosecuted to conviction when the compromise took place. The difficulty felt by *Alderson B.* in *Garth v. Earnshaw*, 3 Younge & Collyer Eq. Exch. 584, seems to have arisen, not from the compromise of the indictment, but from the relation of husband and wife; the report is however very unsatisfactory. The distinction between cases where there has, and those where there has not, been a conviction will not account for the distinction between felonies and misdemeanors. Even in the case of a conviction, it would be in the power of the prosecutor to abstain from bringing the defendant up for judgment. The class of cases adverted to by *Lord Kenyon* in *Drage v. Ibberson*, 2 Espi-



nasse N. P. C. 643, is sufficiently shown by *Collins v. Blantern*, 2 Wilson, 341, 347, and *Johnson v. Ogilby*, 3 P. Wms. 279, and by the notorious practice of compromising assaults. The authorities cited in the latter part of the argument for the plaintiff were not brought forward as establishing the general legality of compromises; the answers given to them are therefore inapplicable. *Haines v. Busk*, 5 Taunton, 521, was not decided on the ground now suggested for the defendants, but on the legality of the compromise.

*Curr. adv. vult.*

TINDAL C. J. in this vacation (June 13), delivered the judgment of the court.

This was an action on an agreement, by which the defendants, in consideration (*inter alia*) that the plaintiff, being the prosecutor of an indictment preferred against certain persons for an assault and riot, would not proceed further on such indictment, undertook and promised plaintiff to pay him a certain amount of money.

• The declaration averred that, in pursuance of such agreement, the plaintiff did not proceed further with the indictment, and did, with the assent of the then defendants, inform the court, before which the indictment was pending, of the premises, and, by leave of the court, forbore to give evidence upon the indictment; and that thereupon the said defendants in such indictment were acquitted.

The defendants pleaded several pleas to this action; but the most material plea is that which raised the question, whether the consideration for the said supposed promise was illegal, and the promise therefore void.

Upon demurrer, the Court of Queen's Bench held this to be so; and the same question has been argued before us on the writ of error. And we think the judgment of the Queen's Bench was right.

It seems clear, from the various authorities brought before us on the argument, that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of *Collins v. Blantern*, 2 Wilson, 341, 347, which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. It is difficult to comprehend the case of

Johnson v. Ogilby, as reported in 3 P. Wms. 277, 279. There a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanor seems to have been the foundation of the decision, if it was made, by Lord Talbot, a distinction overruled in Collins v. Blantern, 2 Wilson, 341, 347, which was decided at a later period. It is not indeed at all clear that the indictment for the fraud was compromised as a part of the agreement, or that the fraud was an indictable one; and perhaps the case may be so explained. If not, it cannot, we conceive, be sustained as law.

In Drage v. Ibberson, 2 Espinasse N. P. C. 643, however, Lord Kenyon adverted to, and stated that he should adhere to the class of cases which held that the consideration for an agreement, being the settling of a misdemeanor, might be good in law. Thus a settlement of an indictment for a nuisance, preferred by public authority, was held a lawful consideration for a bond binding the defendant to remove the nuisance; we presume, on the ground, which however is not very satisfactory, that the main object of the prosecution, the removal of the nuisance, was thereby effected. Fallowes v. Taylor, 7 Term R. 475. But the court seem to have overlooked the consideration that a defendant, who had infringed a public right, was thereby entirely freed from the punishment due to a violation of public law. In Edgcombe v. Rodd, 5 East, 294, Le Blanc J. assigns this as a reason for the consideration being illegal, that there the prosecution was for a public misdemeanor, and not for a private injury, to the prosecutor. It is difficult to reconcile this principle, which we think a just one, with the decision in Fallowes v. Taylor, 7 Term R. 475; nor can Poole v. Bousfield, 1 Campbell, 55, be reconciled with it. There, an agreement to stifle a motion against the defendant, that he should answer the matters of an affidavit, was held illegal.

But there is a class of cases, such as Beeley v. Wingfield, 11 East, 46, and Baker v. Townsend, 7 Taunton; 422, which do not at all break in upon sound principles. *These are cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant, the rights of the public are also preserved inviolate.* As Gibbs C. J. in the latter case well observes, "the parties have referred nothing but what they have a right to refer. They have referred the several

assaults" (by which we understand him to mean their several rights to damages for those assaults); "these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute *refers all other their civil rights*;" which words show our previous interpretation to be correct. The case of *Beeley v. Wingfield*, 11 East, 46, was after conviction; and the promissory note seems merely to have been given for the expenses of the prosecution, and was obviously a part of the punishment inflicted by the court after conviction of the offence.

Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further.

In the case before us, the offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence.

Nor do we think that the assent of the judge was material.

We entirely agree in the observations of the Court of Queen's Bench as to this part of the case; and we think the judgment of the Queen's Bench must be affirmed.

*Judgment affirmed.*

JONES v. RICE.<sup>1</sup>

October Term 1836.

*Compounding Offences.*

A promissory note, given for compounding a public prosecution for a misdemeanor, is founded upon an illegal consideration.

ASSUMPSIT on a promissory note, dated January 1, 1835, made by the defendant to the plaintiff, for \$147.

At the trial, before Shaw C. J. it appeared that on the night of December 31, 1834, a ball was given at the house of Joel Jones, in Sudbury; that an attempt was made, by the defendant and others, to interrupt the ball by violence; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball; that a complaint was filed before a justice of the peace, and a warrant issued by him against some of the rioters; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of \$184; that, of this amount, the sum of \$40 was for damages sustained by three individuals, \$10 for the services of the officer, and \$2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted, by those assembled at the ball, that if the accused would pay the sum proposed, or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms, and paid about \$40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c. and all other demands of any name or nature of said ball party;" and that, in consequence of this arrangement, the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The chief justice was of opinion that the plaintiff was not entitled to recover, because the evidence proved a want of consideration, or a bad consideration, for the note; and the plain-

<sup>1</sup> 18 Pickering, 440.

tiff consented to a nonsuit, subject to the opinion of the whole court.

*Hoar*, for the plaintiff, did not contend that a promise made for the purpose of compounding a criminal prosecution is founded on a good consideration, although it had been so held in England, where the offence was under a felony; but he relied on the point, that the plaintiff might have maintained a civil action for the injury sustained by him, and had a right to compromise such action, and that such right was not affected by the circumstance, that an offence against the public had been committed at the same time. *Collins v. Blantern*, 2 Wilson, 341. *Edgcombe v. Rodd*, 5 East, 294. 1 Chitty Crim. Law, 4. *Harrison v. Parker*, 6 East, 158. *Drage v. Ibberson*, 2 Espinasse N. P. C. 643. *Fallowes v. Taylor*, 7 Term R. 475. *Johnson v. Ogilby*, 3 P. Wms. 276. *Petersdorf's Ab. Compounding*; 4 Bl. Comm. 136.

*S. H. Mann*, for the defendant, cited *Collins v. Blantern*, 2 Wilson, 341; *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunton, 422; 4 Bl. Comm. 363.

PUTNAM J. delivered the opinion of the court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offence against the public. The sum of \$52 was given for the damages and expenses, and \$132 for the compounding of the misdemeanor; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In *Drage v. Ibberson*, 2 Espinasse N. P. C. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was good in law. And the case of *Fallowes v. Taylor*, 7 Term R. 745, proceeds upon the same principle.<sup>1</sup> It was there held by Lord Kenyon and the rest of the court, that a bond given to the plaintiff, (who was clerk of the quarter sessions, and who was directed to prosecute the

<sup>1</sup> But see the observations of Lord Denman C. J. ante p. 218, and of Tindal C. J. ante 237, on these cases.

defendant for a public nuisance), conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russell on Crimes, 210. *Edgcombe v. Rodd*, 5 East, 301.

The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use money, which properly should be levied as a fine upon the criminal party for the use of the commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note, to secure to his own use four times as much as, in his own estimation, his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial, for no part of it belonged to the party. He might settle for his own damage from the riot; but it would enable the party to barter away the public right for his own emolument if we were to hold that the consideration of this note was lawful.

We are all of opinion that the nonsuit must stand.

The question discussed in *Keir v. Leeman* is of very general interest, and the case itself one of great authority. Nothing can be of greater importance than that the law should be well settled and understood upon the question, in what cases and to what extent public offences may be lawfully made the subject of private compromise and arrangement; and yet it is remarkable how little authority was to be found upon the subject, and, of that little, how much that was conflicting and uncertain. The full examination of the subject in the cases in the text, renders further discussion of it unnecessary. The old rule, that the law will not allow a criminal charge to be disposed of by private agreement or compromise, applies universally, in cases of felony.<sup>1</sup> Any agreement not to give

<sup>1</sup> Where an indictment for compounding felony alleged that the defendant desisted from prosecuting, and it appeared that he did prosecute to conviction, the defendant was held entitled to be acquitted. *Rex v. Stone*, 4 Carrington & Payne, 379, per Bosanquet J. But Mr. Greaves queries, whether, if the indictment had omitted this averment it would have been good. The offence seems to be the letting the thief go without prosecution. 1 Russell on Crimes, 195 note. 4th ed.

evidence against a party accused of felony, on his trial, or in any way to compound such a charge, was long since held to be entirely illegal and void. Compounding a mere charge of felony is also illegal; as where a person, having charged a man before a magistrate with embezzlement, agrees not to prosecute the charge in consideration of a bill of exchange being accepted by another person. *Fivaz v. Nicholls*, 2 Common Bench, 501. See *Bigelow v. Woodward*, 15 Gray, 560. And so far is this principle carried, so entirely void is such a contract, that a note given to compound a felony is void even in the hands of a *bonâ fide* indorsee. *Bell v. Wood*, 1 Bay, 249, dictum; the note in this case having been overdue when passed to the plaintiff. To render a promise void however, because the consideration was the sitting of a criminal prosecution, the promise must be made for gain, and not merely for motives of kindness and compassion. *Ward v. Allen*, 2 Metcalf, 53. *Commonwealth v. Pease*, 16 Massachusetts, at p. 94.

This principle was settled in *Jones's Case*, reported in 1 Leonard, 203, as follows: "Hen. Jones had stolen the Plate of Trinity Colledge in Oxford, and by mediation of his friends it was concluded and agreed, that no Evidence should be given against him at the Sute of the Colledge, and that the Colledge should be recompenced for the losse, and two of his Friends, Brien and Brice were bound unto Doctor Underhill, Rector of Lincoln Colledge in Oxford, (but unto the use of the Master and Scholrs of Trinity Colledge) upon condition that if the said Obligor paid forty pounds within six months after the said Hen. Jones should be acquitted & released of the troubles wherein he now is, with the safety of his life, that then, &c. In debt upon the Obligation The Defendants pleaded that he was indicted at the Assizes at Ox. Arraigned upon it, scil. for the stealing of the said Plate, and found guilty thereof, and had his Clergy, and was burned in the hand, & he demanded Judgment of this Action, upon which there was a Demurrer: Wind. If the words had been to pay the money, after that Henry Jones should be released and acquitted of the troubles in which he now is without any more, the Defendants had been bounden to pay the mony. Periam. If the words of the condition had been, that after Henry Jones should be acquitted of the Felony, then no mony payable, but here the words are with safety of his life: but here he conceived, that the intent of the Obligation was, that no Evidence should be given, and so to save his life from the Gallows, for which the Defendants might have shewed the special matter, and averred that the Obligation was made for the discharge of a Felon, and so against the Law, &c. but now, they cannot take advantage of it, and afterwards Judgment was given for the Plaintiff."

In *Mason v. Watkins*, 2 Ventris, 109, the rule adopted in *Jones's Case* was followed: "An Action of Debt, upon a Bond of 20*l*. The Defendant demanded Oyer of the Condition, which was, That the Obligor should not himself bring any Evidence at the Assizes to prove the two Cows now in Question between one Owen Mason the Younger, and the said Watkins, to be the Cows of the said Watkins or of Robert Gillo; and that the said Gillo shall set in a Bill of Ignoramus, that then the Bond should be void. The Defendant pleaded *quod ipse de deb præd. virtute Scripti Obligat prædict' onerari non debet*, because that one of the said Cows was the Cow of the said Watkins, and the other of the said Gillo; and that before the Bond, Owen Mason jun. in the said Condition

mentioned, being the Plaintiff's Son, stole the said two Cows, and was imprisoned thereupon; and the Defendant Watkins was bound by Recognizance to prosecute him at the Assizes for the said Felony; and there the said Mason jun. was indicted and convicted, and the Defendant did give Evidence that one of the Cows was his, prout bene licuit, and that the Defendant did not give any Evidence by himself, or any one else, to prove the two Cows to be the Cows of the Defendant, or the Cows of the said Gillo, & hoc paratus est verificare, &c., unde petit judicium, &c. To this the Plaintiff demurred, and upon the first Opening, Judgment was given for the Defendant; for the Condition is against Law, viz. to shift off Evidence of Felony, and that makes the Bond void, vide Jones's Case, 1 Leonard, 203, and the Court recommended it to Serjeant Pawlet, who was a Judge in Wales where the Plaintiff lived, to see to have him prosecuted for taking such a Bond."

In *Palmer v. Smith*, 5 New Hampshire, 553, a person had been arrested for passing counterfeit bills; the defendant agreed to pay the prosecutors for their loss by the counterfeit money, and for their expenses, and *also to indemnify them against their recognizances* to appear against the accused party; and borrowed the money of the plaintiff for this purpose, and with his knowledge that it was to be so used. The money was paid to the prosecutors, and they did not appear against the accused, and their recognizances were forfeited. It was held, that the plaintiff could not recover the money lent for this illegal purpose. See also *Shaw v. Spooner*, 9 New Hampshire, 200; *Hinesburgh v. Sumner*, 9 Vermont, 23.

In *Hinds v. Chamberlain*, 6 New Hampshire, 225, the defendant being sued for an assault and battery, compromised with the plaintiff, giving his note for \$25, the plaintiff agreeing, as part of the consideration for the note, that he would also indemnify the defendant against any public prosecution which *might be* instituted for the same amount. The note was held entirely void, Parker J. saying: "How is an individual to indemnify in such case? He has no power to stay the arm of public justice. He has no authority to prevent a prosecution. Any attempt so to do, by suppressing evidence, would be of itself illegal. *Plumer v. Smith*, 5 New Hampshire, 553. If a prosecution is instituted, and conviction follows, — and it may here be remarked that all parties seem to have understood that an offence had been committed, although the obligees did not expressly admit it, — the sentence of the law might be imprisonment of the offenders. But the obligor could not be vouched in to receive the sentence, and be subjected to the imprisonment in the place of those who had committed the crime, nor could he voluntarily offer himself to appease the demands of the law against the obligees. They must suffer the imprisonment; and how then is indemnity to be made, and compensation given for imprisonment in pursuance of a legal sentence of a court of justice, for an offence against the laws of the land. If the defendant were thus lawfully imprisoned, surely he would not be heard in courts of justice, in an action on his bond, to recover an indemnity for the suffering which the law had imposed on him for its violation; nor, it is believed, was a hearing in chancery ever yet known to estimate in dollars and cents how much damage it had been to an individual that the righteous judgment of the law had been executed upon him." See *Corley v. Williams*, 1 Bailey, 588; *Vincent v. Groom*, 1 Yerger, 430. And although a discontinuance be obtained by consent



of the prosecuting officer, it has yet been held, that a contract to pay for procuring such discontinuance is void. *Shaw v. Reed*, 30 Maine, 105.

In *Regina v. Richards*, 11 Cox C. C. 43, the prisoner was indicted for threatening to accuse the prosecutor of an infamous crime with a view to extort money. Blackburn J. instructed the jury: "Whether the crime charged upon the prosecutor by the prisoner was or was not one in fact is not material in this, that if the prisoner intended to extort money by threatening to make the accusation, he is equally guilty whether it was or was not true; but it is material for you in considering what was the intention of the prisoner in demanding the money. If the prisoner believed the statement of his son, that the prosecutor had committed an infamous crime on him, and, acting on that belief, went to the prosecutor and accused him of the crime, but without any purpose at that time to extort money by such accusation, he had not been guilty of the offence laid in this indictment, and if, after the accusation is made, with a belief in its truth, the prisoner endeavored to compromise it by payment of money, he might be guilty of the offence of compounding a felony, but he would not be guilty of obtaining money by threats."

But an agreement to settle a *misdemeanor* may, in some cases, be perfectly valid; and indictments for various species of misdemeanors are continually, and with the sanction of the courts, referred to an arbitrator for decision. *Blanchard v. Lilly*, 9 East, 497. *Russell on Arbitration* (London ed. 1856), 12. A rule of very general application, as to what criminal matters may be referred, is thus stated by Gibbs C. J. in *Baker v. Townshend*, as reported in 1 Moore, 124: "Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced."

A similar rule is laid down in the following case. An indictment for a conspiracy, to obstruct persons in carrying on their business as owners of omnibuses, had been referred, at the suggestion of the judge before whom the trial had commenced. On the case coming before the Court of King's Bench, on another point, Patteson J., in his judgment, adopted, as containing a statement of the common law, the following passages from a note to Chitty's Statutes, 1 Chitty's Statutes, 33, note (b) to stat. 9 & 10 Wm. III. ch. 15: "That criminal offences which are personal, such as assault," &c. "and for which an action of damage would lie, may, it is said, be submitted to arbitration;" and "if an indictment has been preferred in any such case, the matter of complaint may still be referred by leave of the court." *Rex v. Bardell*, 5 Adolphus & Ellis, 619; s. c. reported as *Rex v. Shillibeer*, 5 Dowling, 238. Referring to the above case on a subsequent occasion, the court, adopting the principles above cited, declined to lay it down as law, that an indictment for conspiracy could be referred. *Regina v. Hardey*, 14 Queen's Bench, 529.

In cases of ordinary assaults, where the party injured has proceeded by indictment, all the authorities concur that the policy of the law will admit of a compromise or reference. *Elworthy v. Bird*, cited by Lord Denman in the text, ante, p. 220. *Blake's Case*, 6 Rep. 43. *Horton v. Benson*, *Freeman*, 20. *Russell on Arbitration* (London ed. 1856), 14. In several of the United States, provision is made by statute for compromising certain misdemeanors in special cases.

It is quite clear that an indictment for perjury cannot legally be referred. *Regina v. Hardey*, 14 Queen's Bench, 529. *Collins v. Blantern*, 2 Wilson, 341. Notwithstanding an opinion expressed in an earlier case, *Rex v. Cotesbatch*, 2 Dowling & Ryland, 265, it is now decided that an indictment for non-repair of a highway is not capable of being lawfully determined by arbitration, as it is not a case in which the party injured had a remedy by action. *Regina v. Blakemore*, 14 Queen's Bench, 544. See *Rex v. Cotton*, 3 Campbell, 444. A presentment and proceedings before commissioners of sewers, to procure the removal of some weirs and hatches in a river, have been made the subject-matter of a valid award. *Doddington v. Bailward*, 7 Dowling, 640.

After conviction, a compromise has often been sanctioned by the courts. Thus agreements of compromise made by the defendants, with the approval of the court, after conviction of the several misdemeanors of ill-treating a parish apprentice, *Beeley v. Wingfield*, 11 East, 46, and of disobeying an order of maintenance, made by justices, have been sustained as legal. *Kirk v. Strickwood*, 4 Barnewall & Adolphus, 421; 1 *Neville & Manning*, 275. See also *Goodall v. Lowndes*, 6 Queen's Bench, 464. In criminal matters, after conviction before a court of Quarter Sessions, a reference is lawful; for where a defendant, after conviction before the Quarter Sessions on an indictment for assault, was called up for judgment, and, by the recommendation of the court, the prosecutor and defendant entered into an agreement of reference respecting the matters in difference between them, including the assault and the costs of the indictment; on its being contended, on the strength of *Rex v. Harding*, 2 Salkeld, 477, that the Quarter Sessions had no power to refer the matter to be determined by another, the Court of Common Pleas sustained the validity of the submission. *Baker v. Townshend*, 7 Taunton, 422; 1 *Moore*, 120.

It seems the better opinion, though there is no express decision on the point, that the consent of the court in which an indictment is pending for trial must be obtained in order that the reference should be effectual.

In the generality of the cases cited with respect to the reference of criminal matters, it will be seen that the sanction of the court was given to the submission or compromise; and from the statement, 1 Chitty's Statutes, 33, note (b) to 9 & 10 Wm. III. ch. 15, by Patteson J. in the case *Rex v. Bardell*, 5 Adolphus & Ellis, 619, repeated in *Regina v. Hardey*, 14 Queen's Bench, 529: "That if an indictment has been preferred," &c. "the matter may still be referred by the leave of the court," it may probably hereafter be determined that the criminal matters there mentioned, which before indictment, the parties may submit of themselves, require the leave of the court to give a sanction to the reference after an indictment has been preferred. *Russell on Arbitration* (London ed. 1856), 15, 16.

The compounding of informations on penal statutes is a misdemeanor against public justice, by contributing to make the laws odious to the people. 4 Bl. Comm. 136. 1 *Russell on Crimes*, 197. 4th ed. Therefore, in order to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted by the 18 Eliz. ch. 5, § 4, that if any person, "by color or pretence of process, or without process upon color or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward," without the order or consent

of some court, he shall, &c. This statute does not apply to penalties which are only recoverable by information before justices; and an indictment for making a composition in such a case was held to be bad, on motion in arrest of judgment. *Rex v. Crisp*, 1 Barnewall & Alderson, 282. And see *Rex v. Southerton*, 6 East 126.

A party is liable to the punishment prescribed by the 18 Eliz. ch. 5, for taking the penalty imposed by a penal statute, though there is no action or proceeding for the penalty. The prisoner applied to one Round, and demanded five pounds, as a penalty which Round had incurred under the General Turnpike Act, by suffering his wagon to be drawn on a turnpike road by more than four horses. Round had incurred such a penalty, and the prisoner obtained the money by way of composition to prevent any legal proceedings; no process had been sued out, and no information had been laid before a magistrate. The prisoner having been convicted, judgment was respited, upon a doubt whether the offence was within the statute, so as to subject the prisoner to the specific punishment therein prescribed, inasmuch as no action or proceeding was depending in which the order or consent of any court in Westminster Hall for a composition could have been obtained. But the Judges were all of opinion that the conviction was right, and that the statute applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a court at Westminster, or without judgment or conviction. *Rex v. Gotley, Russell & Ryan* C. C. 84.

A person may be convicted under the 18 Eliz. ch. 5, § 4, for taking money upon color or pretence of a party having committed an offence, though in fact no offence liable to a penalty has been committed by the person from whom the money is taken. One Peverill, who kept a retail beer-shop, but had no license to sell spirits, having given a woman a glass of gin, as a new-year's gift, the prisoner threatened to prosecute him for selling gin without a license, and afterwards obtained money from Peverill, as a reward for forbearing to prosecute him for the supposed offence of selling gin without a license. No information was actually preferred, nor any process sued out. It was objected that, as no offence had been actually committed by Peverill, and as no process had been issued, or information laid against him, the case was not within the statute. The jury having found the prisoner guilty, upon a case reserved, the Judges thought that the words "upon color or pretence of any matter of offence," extended to a case where no penalty had been incurred, and that the conviction was right. *Regina v. Best*, 2 Moody C. C. 124; 9 Carrington & Payne, 368.

There is a class of cases, which may here be noticed, in which the consideration has been held to be illegal, as against public policy. In the case of *Kingsbury v. Ellis*, 4 Cushing, 578, a promissory note was given to the plaintiff, who was a magistrate, for the amount of fines and costs imposed by him upon the defendant, the maker of the note, on a criminal charge. In an action on the note, it was held that the consideration was illegal, being in violation of public duty. Chief Justice Shaw delivered the opinion of the court: "This case is quite distinguishable from that of *Beeley v. Wingfield*, 11 East, 46, cited in the argument; that was a note given to parish officers, at the recommendation of the court, as an indemnity for expenses personally incurred by the parish. But such a proceeding as this is entirely contrary to public policy. If a magistrate, or

any other judicial officer, could enter into a negotiation with a convict, take a contract to himself, and enforce it by law, it would operate as a temptation to the judge, and lead to the oppression of the accused by the use of public process. If the judge might take a note with surety, he might take a pledge of personal, or a mortgage of real estate, or make any other contract in his own name. It would, we think, lead to complicated relations between ministers of the law and parties accused, entirely inconsistent with the purity, simplicity, and directness, which should ever characterize the administration of the criminal law." A justice of the peace sentenced a prisoner, whom he had convicted of larceny, to pay a fine and costs, and, on his failure to pay them, delivered a mittimus to an officer, who, while conducting the prisoner to jail, took the promissory note of a third person for the amount of the fine and costs, and his own fees, payable to the justice, and discharged the prisoner. The note was held to be void, for illegality of consideration; the court saying that the act of the officer was clearly a violation of his official duty, and against public policy. *Bills v. Comstock*, 12 Metcalf, 468.

But in these cases, as in all other illegal contracts, if the contract has been fully executed, — if the money, or other consideration, has been fully paid, — it cannot be recovered back. *Worcester v. Eaton*, 11 Massachusetts, 368. *Dixon v. Olmstead*, 9 Vermont, 310. *Bailey v. Brick*, 11 Vermont, 252.

The reader should carefully distinguish the questions discussed in this note from others liable to be confounded with them, arising in civil jurisprudence. The right to take amends applies to many cases of private injuries; yet it is sometimes a question of fact, whether the amends taken were not intended to operate as a compounding of the public offence. And it is sometimes a question of law, whether the court will enforce an obligation given to pay for the private injury, as having been obtained under circumstances calculated to obstruct the course of public justice. It must be remembered that if, in a particular case, the plaintiff is not permitted to prevail in his civil suit, the consequence does not necessarily follow that he would be indictable. See 1 Bishop *Crim. Law*, § 650. 4th ed.

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### THE KING v. PEACE.<sup>1</sup>

May 8, 1820.

#### *Evidence — Variance by Proof of two Persons of the same Name.*

Upon an indictment for an assault upon E. E., it is sufficient to prove that an assault was committed upon a person bearing that name, although it appear that two persons bore the same name, E. E. the elder and E. E. the younger.

THE defendant was indicted for an assault and battery, stated on the record to have been upon the person of Elizabeth Edwards. Plea, not guilty. At the trial at the last spring assizes for the

<sup>1</sup> 3 Barnewall & Alderson, 579.

county of Hereford, before Holroyd J. it appeared that there were two persons, a mother and a daughter, both of the name of E. E., and that, in point of fact, the assault had been committed on the daughter. It was objected, at the trial, that this proof varied from the indictment, inasmuch as E. E. must be presumed to be E. E. the elder. The objection was overruled, and the defendant convicted; and now, the defendant being brought up for judgment,

*W. E. Taunton* renewed his objection. In *Lepiot v. Brown*, 1 Salkeld, 7, it was held, that if father and son are both called A. B., by naming A. B. the father *primâ facie* shall be intended. So in *Wilson v. Stubbs*, Hobart, 330, the court said, that one being named Ralf Stubbs, without addition, should never be accounted the younger, but the elder of the two of that name.<sup>1</sup> Here the objection is, to the description of the prosecutrix, the person against whom the offence has been committed. There are two persons bearing the name of Elizabeth Edwards; and the person therefore in the indictment must be taken to be the elder. And he cited *Hawkins P. C.* vol. 3, tit. Appeals, § 106; and *Viner Ab.* vol. 14, tit. Indictment, N. 15, 16, 17.

*PER CURIAM.* The crime charged in the indictment has been proved. For it is stated, that the defendant committed an assault on Elizabeth Edwards, and that has been proved. It is not absolutely necessary that the indictment should specifically describe the individual on whom the assault was, for otherwise an indictment would be bad, which charged that the assault was committed on a person to the jurors unknown. The question here is, not whether the party assaulted has been rightly described, but who the party is who is described in the indictment as having been assaulted. Here that has been sufficiently proved. The objection therefore is not sustainable.

*Judgment for the Crown.*

The ratio decidendi of this case is, that where a person is described by name simply, without addition, evidence that there are two persons of the same name is no variance, for the allegation is still true. In *The State v. Vittum*, 9 New Hampshire, 519, the indictment alleged that the defendant committed adultery with one L. W. without any further designation. It appeared that there were in that town two individuals of that name, father and son, and that the son used the addition of "junior" to his name, and was thereby well known and dis-

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<sup>1</sup> *Sweeting v. Fowler*, 1 Starkie N. P. C. 106. *Stebbing v. Spicer*, 8 Common Bench, 827. *Purcell Crim. Pl.* 68.

tinguished from his father. It was held, that the defendant had the right to understand that the offence was charged to have been committed with the father, and that evidence of adultery with the son was not admissible in evidence. Upon this ground, this case is not in conflict with *The King v. Peace*. In that case, it did not appear as in *The State v. Vittum*, that there was any usual designation of the daughter as junior or younger. In *Hodgson's Case*, 1 Lewin C. C. 236, the prisoner was indicted for stealing a horse, the property of Joshua Jennings. It appeared in evidence, that the horse was the property of Joshua Jennings, the son of Joshua Jennings, the father. For the prisoner, it was objected, that the person named in the indictment must be taken to be Joshua Jennings the elder. But Parke J. on the authority of *The King v. Peace*, overruled the objection. The same point was afterwards ruled on the same authority in *Bland's Case*, York Summer Assizes, by Bolland B. 1 Lewin C. C. 236. In a recent case in Maine, the same objection was taken as in *Rex v. Peace*, and was overruled. *The State v. Grant*, 22 Maine, 171. In this case, which was an indictment for larceny, the property charged to have been stolen was alleged to have been "the property of one Eusebius Emerson of Addison in the county of Washington." The evidence was, that there were, in that town, two persons, father and son, and that the property belonged to the son, who had usually written his name with the word "junior" attached to it. And it was held, that junior is no part of a name, and that the ownership, as alleged in the indictment, was sufficiently proved.

In an indictment for perjury, a suit in the Ecclesiastical Court was stated to have been depending between A. B. and C. D. The proceedings of the suit, when produced, were between A. B. and C. D. the *elder*, and it was held that there was no variance. *Rex v. Bailey*, 7 Carrington & Payne, 264. So where an indictment for perjury alleged that there was a plaintiff, in which William Withers, the *younger*, was plaintiff, and the plaintiff was merely "William Withers, plaintiff," Rolfe B. held that this was no variance. *Regina v. Withers*, 4 Cox C. C. 17. In *Rex v. Bailey*, *ubi supra*, Williams J. referred to a manuscript case before Lawrence J., where it was alleged that there was an indictment against A. B. and C. D. at a former time, and, on the record being produced, it appeared that it was an indictment against A. B. and C. D. the *younger*, and the variance was held to be fatal; on which it was observed that that must have been on the ground that if a person was named simply it meant the elder.

Where an indictment alleged an assault on T. A. a deputy sheriff, and an obstructing of him in the performance of his duties as such, proof that the person, on whom the assault was committed, was commissioned as a deputy sheriff, by the name of T. A. *junior*, is not a variance. *Commonwealth v. Beckley*, 3 Metcalf, 330. "To support the indictment," said Wilde J., "it must have been proved that the person named therein, and in the commission, was one and the same person; and after verdict it must be presumed that it was so proved. The defendant's counsel rely on the decision in *Boyden v. Hastings*, 17 Pickering, 200. But the cases differ. There the plaintiff undertook to describe the record of a judgment, and did not describe it correctly. Not so in the present case. The indictment does not allege by what name and addition Adams was commissioned as deputy sheriff. There is therefore no error of description. In the former case, there was a mistake in the declaration. It was a question as to the

pleadings. In the present case, it is merely a question of proof. Suppose an action is brought in the name of A. B., and there is a special declaration on a promissory note, as payable to him, and a note is offered in evidence, payable to A. B. junior, that would be a variance which could not be cured by proof that the note was given to him, by the name of A. B. junior; but he must amend his declaration, as was done in *Boyden v. Hastings*. But suppose in the like case, such a note is offered in evidence in an action for money had and received; then the plaintiff may prove that the note was given to A. B. by the name and addition of A. B. junior; which is alike in principle to the present case."

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THE STATE *v.* FREEMAN.<sup>1</sup>

July Term 1843.

*Indictment — Need not be certified to be "A True Bill."*

The omission of the words "a true bill," does not vitiate an indictment.

INDICTMENT for forgery. After a trial, and verdict of guilty, the counsel for the prisoner moved in arrest of judgment, "because there is no legal evidence that the paper purporting to be a bill of indictment was ever found to be 'a true bill,' by the grand jury." The bill was signed by the foreman, but the words, "a true bill," were omitted. The question was transferred to this court for determination.

*Fox*, County Solicitor, for the State.

*Butler* (of Massachusetts), for the prisoner.

GILCHRIST J. It has always been customary, in our practice, that an indictment should be certified by the foreman of the grand jury to be "a true bill." This form has been adopted from the English practice, and if the same reason for it exist here as in England, its omission will be a fatal defect. If it be a mere form here, without any substantial meaning or importance, the motion in arrest of judgment must be overruled. A slight attention to the manner in which indictments originate in England will show the reason why this form has been there followed, and will enable us to determine whether the same necessity exists here.

In England, an accusation of a crime is preferred to the grand jury by one or more persons in the name of the king, but at the

<sup>1</sup> 13 New Hampshire, 488.

suit of these private prosecutors. Until this accusation is found by the grand jury to be true, it is merely a bill, and is so to be termed in pleading, and not described as an indictment. The prosecutor must cause the bill to be properly prepared and engrossed upon parchment. After considering the bill, and the evidence in support of it, if the grand jury are satisfied of the truth of the charge, they indorse upon it, "a true bill." The bill, thus indorsed, becomes an indictment, and a complete accusation against the prisoner. The indictment is then said to be found, and the prisoner stands indicted. Com. Dig. Indictment, A. Crown Cir. Com. 32. 1 Chitty Crim. Law, 162, 163, 324. 4 Bl. Comm. 302, 303, 304.

It is thus apparent that in England there are two parties who must act before an indictment can be found. The prosecutor must draw up the bill, and lay it before the grand jury; who, if they find the charge substantiated, must certify that the bill thus presented is a true bill. This arises from the fact, that in England indictments are not found unless upon some charge brought by an individual against the prisoner; and before a person can be arraigned upon such a charge, it must receive the certificate of the grand jury that it is true. But here the practice is essentially different. No bill is drawn up by a private person, in the first instance, and laid before the grand jury with evidence to support it. Witnesses are first examined before the grand jury, who then determine whether the evidence be sufficient to authorize them to prefer a criminal charge against the accused. If they think it is, an indictment is drafted by the attorney-general or solicitor, and signed by him. This proceeding is not like a charge made by some other person, and laid before them for their approval; but the indictment is the result, in legal form, of their deliberations. The reason for the English form does not exist, for it is unnecessary that they should certify that their own proceedings are true. There is, strictly speaking, no *bill* to be certified to be correct, in our practice, the distinction between a bill and an indictment, which arises in England from their forms, not being necessary here. With us, the accusation does not take the form, first of a bill and then of an indictment, but it exists only as the latter. We have held, in the case of *The State v. Squire*, 10 New Hampshire, 558, that the signature of the foreman of the grand jury should be affixed to indictments, and that nothing short of such



authentication should be regarded as competent evidence of their proceedings. If any thing more than the signature of the foreman could be necessary to prove that the instrument signed by the prosecuting officer is authorized by the grand jury, the certificate should be, "a true indictment," rather than "a true bill." As these words are merely a form, and moreover an incorrect form; and as the reason for them does not exist here, we think that their omission is not a ground for arresting the judgment.

We are aware that Webster's Case, 5 Greenleaf, 432, is an authority the other way. But that case was decided on the ground that it had always been the usage in England and in Massachusetts to affix these words to an indictment. The reason why they are necessary in England, and the fact that the mode of originating indictments here is different from that which exists there, are not adverted to; and with all deference to the eminent standing of Chief Justice Mellen, who pronounced the judgment of the court, we feel constrained to come to a different result from that to which his reasoning led him.

The motion in arrest of judgment is overruled, and there must be  
*Judgment on the verdict.*

In several of the United States there have been conflicting decisions upon the point decided in the principal case. Recently in Massachusetts, it has been followed and approved as a "decision placed upon grounds which are satisfactory and conclusive." *Commonwealth v. Smyth*, 11 Cushing, 473. In this case the indictment was signed by the foreman of the grand jury, and countersigned by the attorney for the commonwealth; but the words "a true bill," were nowhere found upon it. This deficiency the defendant insisted was a material and fatal objection to it: first, because these words are an indispensable part of every indictment; and, secondly, because they constitute the only recognized phraseology by which the action of a grand jury, in the due presentment of a criminal accusation, can be legally authenticated. Merrick J.: "This position seems to be well warranted by the English decisions; and if such an objection were made in those courts, it would undoubtedly be sustained. For there it is held, that these words are not only indispensable to make a complete and valid legal accusation, but that when indorsed upon a bill, they become incorporated with, and make a material part of its allegations. This necessarily results from the peculiar course of proceeding in the allowance and institution of prosecutions upon the presentment of a grand jury in that country. The words, 'a true bill,' obviously constitute no part of the description of the offence charged in the indictment. They are not indispensable to the due and legal authentication of the action of the grand jury. Their absence can subject the accused to no inconvenience or disadvantage. The reason upon which they are elsewhere held to be essential does not exist in our practice and mode of pro-

cedure; and, therefore, this omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant." In *The State v. Webster*, 5 Greenleaf, 373, it was held, for reasons which do not exist in the criminal practice and mode of procedure in this country, that the omission of the words, "a true bill," was a fatal error. A similar decision was made in *Nomaque v. The People*, Breese, 109. "We are of opinion," said Smith J., "that it was necessary, in order to give the court the right to try the prisoner, that the grand jury should have indorsed their finding on the indictment, verified by the signature of their foreman. This was indispensable, and as it appears not to have been done, the proceedings were coram non iudice." In some of the United States, these words are required by statute. *Gardner v. The People*, 3 Scammon, 83. *Spratt v. The State*, 8 Missouri, 247. *McDonald v. The State*, 8 Missouri, 283. *Commonwealth v. Walters*, 6 Dana, 290. *Bennett v. The State*, 8 Humphreys, 118. *Laurent v. The State*, 1 Kansas, 313. But the statute is directory merely, and the omission of them is no ground for arresting the judgment. *The State v. Mertens*, 14 Missouri, 94. *Wau-kon-chaw-neck-kaw v. United States*, Morris (Iowa) 332. *The State v. Axt*, 6 Iowa (Clarke) 511. See *Steele v. The State*, 1 Texas, 142. The words, "true bill" however have been held sufficient, and as good as "a true bill." *The State v. Davidson*, 12 Vermont, 300. *The State v. Elkins*, Meigs, 109. So have the words, "a bill," omitting the word "true." *Sparks v. The Commonwealth*, 9 Barr, 354. Where there was no indorsement of the words, "a true bill," upon the indictment, but they were upon an envelope, in which the indictment was folded, and were followed by the signature of the foreman, this was held sufficient, after verdict. *Burgess v. The Commonwealth*, 2 Virginia Cases, 483. See *Commonwealth v. Betton*, 5 Cushing, 427.

Whether or not indictments should be signed by the foreman, is also a question upon which the authorities are conflicting. In *The State v. Squire*, 10 New Hampshire, 558, referred to in the principal case, Upham J. said: "In this country, the practice has been, after an indictment has been duly enrolled, to add the finding, 'This is a true bill'; and affix to it the signature of the foreman; and indictments thus found are presented to the court in the presence of the jury. This mode of authenticating indictments is analogous to that of all our forms of legal process, and we can see no good reason why it should be departed from. Indictments are our highest forms of original proceeding, and can be found solely by the grand jury, with such advice merely as the counsel for the State may give; and it is highly proper that all their acts should bear the test of the presiding officer of their body. Nothing short of such authentication should be regarded as competent evidence of their proceedings; and indictments thus found should be presented to the court in the presence of the jury. A change in either of these respects might lead to doubt as to what were the true proceedings of the jury, and diminish confidence as to their definite and independent action."

Contrary decisions have been made in South Carolina, North Carolina, Georgia, and in Kentucky. *The State v. Creighton*, 1 Nott & McCord, 256. *The State v. Coe*, 6 Iredell, 440. *The State v. Calhoon*, 1 Devereux & Battle, 374. *McGuffie v. The State*, 17 Georgia, 498, 510. *Commonwealth v. Walters*,

6 Dana, 290. In *Commonwealth v. Walters*, the court said that they knew of no statute or other authoritative rule of practice which requires that the foreman of the grand jury should put his name on the back of an indictment, either with or without the designation of his character of foreman. In Mississippi an indictment indorsed as a true bill, and returned by the authority of the whole grand jury, is sufficient, without the special appointment of a foreman. *Friar v. The State*, 3 Howard, 422. *Peters v. The State*, 3 Howard, 433. The record is sufficient evidence of the appointment of the foreman, by the court. *Wood-sides v. The State*, 2 Howard (Miss.) 655. A variance between the name of the foreman on the record, and his signature on the indictment, is immaterial. *The State v. Calhoon*, 1 Devereux & Battle, 374. *The State v. Collins*, 3 Devereux, 117. *The State v. Stedman*, 7 Porter, 495. *The State v. Taggart*, 38 Maine, 298. It is no ground for arresting judgment, that the foreman in his signature has abbreviated his Christian name, signing the same with his surname and the initial of his Christian name. *Commonwealth v. Hamilton*, 15 Gray, 480. His name alone is sufficient, without the addition of the words, "foreman of the grand jury." *The State v. Chandler*, 2 Hawks, 439. *The State v. Brown*, 31 Vermont, 602. Under a statute requiring indictments to be signed by the foreman, it has been decided, that, as the object of the signature is to show to the court that the indictment had been passed upon and found by the grand jury, this is as well shown by an indorsement of his signature as by placing it at the foot of the indictment. *Overshiner v. The Commonwealth*, 2 B. Monroe, 344.

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### REX v. JACKSON.<sup>1</sup>

Trinity Term 1822.

#### *Rape — Married Woman — Consent obtained by Fraud.*

Having carnal knowledge of a married woman under circumstances which induce her to suppose it is her husband. *Held*, by a majority of the Judges, not to amount to a rape.

THE prisoner was convicted before Mr. Justice Bayley, at the spring assizes at Lancaster, in the year 1822, for a burglary, with an intent to commit a rape upon a married woman.

It appeared in evidence that the prisoner went into the room, and got into the woman's bed as if he had been her husband; that he was in the act of copulation when she made the discovery, and immediately, and before completion, he desisted. The jury found that he entered the house with intent to pass for her husband, and to have connection with her if she did not discover the

<sup>1</sup> Russell & Ryan C. C. 486.

mistake, but not with the intention of forcing her if she made that discovery. The learned judge thought it right to reserve the question for the consideration of the Judges, whether the connection with the woman, whilst she was under that mistake, would have amounted to a rape, and he accordingly respited the sentence.

The case was considered by the Judges in Trinity term 1822, when four Judges thought, that the having carnal knowledge of a woman whilst she was under the belief of its being her husband, would be a rape, but the other eight Judges thought that it would not; and Dallas C. J. pointed out forcibly the difference between compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation; but several of the eight Judges intimated, that if the case should occur again, they would advise the jury to find a special verdict.

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REGINA v. CLARKE.<sup>1</sup>

November 11, 1854.

*Rape — Married Woman — Consent obtained by Fraud.*

The prisoner had carnal knowledge of a married woman under circumstances which induced her to suppose he was her husband. The jury found that when he entered the bed of the prosecutrix he intended to have connection with her fraudulently, but not by force; and if detected, to desist. *Held*, that the prisoner could not be convicted of a rape.

THE following case was reserved for the opinion of the Court of Criminal Appeal by Mr. Justice Crowder.

Richard Clarke was tried before me at the York Assizes, on the 16th July 1854, on an indictment charging him in the usual form with committing a rape on the person of Jane Murgatroyd, the wife of John Murgatroyd. It appeared in evidence that Jane Murgatroyd went to bed at half-past nine o'clock in the evening, leaving the outer door of her house unfastened, in the expectation of her husband's return home. Having fallen asleep, she was awakened at about half-past two o'clock by a man, whom she believed to be her husband, passing over her and getting into bed on

<sup>1</sup> Dearsly C. C. 397; 6 Cox C. C. 412.

the opposite side from that on which she was lying. She then fell asleep again ; and in about ten minutes was awakened by the man in bed with her drawing her towards him and having connection with her. She assented to the connection in the belief that the man was her husband. She afterwards fell asleep again and awoke in about twenty minutes, and then first discovered that the man in bed with her was the prisoner at the bar, who, as soon as he found himself detected, jumped out of the bed and went away. The jury found the prisoner guilty ; but they found also that when he entered the bed of Jane Murgatroyd, he intended to have connection with her fraudulently, but not by force, and, if detected, to desist ; whereupon I respited the sentence, reserving for the opinion of the Court of Criminal Appeal the question whether, upon the above state of facts and finding of the jury, the prisoner is entitled to an acquittal.

R. B. CROWDER.

The case was argued on the 11th of November 1854, before JERVIS, C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

No counsel was instructed on behalf of the prisoner.

*R. Hall* appeared for the Crown.

JERVIS C. J. How can you get rid of the authority of *Rex v. Jackson*?

*Hall.* The question is, whether that can be supported.

CROWDER J. I reserved this case, because it is stated in the report of *Rex v. Jackson*, that several of the Judges, who held that the offence was not rape, intimated that if the case should occur again, they would advise the jury to find a special verdict,

*Hall.* It is true that it was held by a majority of the Judges in *Rex v. Jackson* that having carnal knowledge of a woman under circumstances which induce her to suppose it is her husband, does not amount to a rape ; but four of the twelve Judges who considered that case thought that a carnal knowledge so obtained would be a rape, and though the other eight Judges thought it would not, several of the eight intimated, that if the case should occur again, they would advise the jury to find a special verdict. The facts in that case are not distinguishable from the facts in this ; and although the decision in *Rex v. Jackson* has been followed in subsequent cases, the matter is still, I apprehend, open for argument, and I contend that the consent of the prosecutrix was not to the connection with the prisoner, but to a con-

nection with her husband. She submitted to what she supposed to be the exercise of a legal right, and the prisoner cannot be allowed to take advantage of his own fraud.

JERVIS C. J. We have conferred with several of the other Judges, and we think we cannot permit this question to be opened now, but we are bound by the decision in *Rex v. Jackson*.

The other Judges concurred.

*Conviction quashed.*

In this class of cases it was at first held, as was remarked by Lord Campbell C. J., that fraud supplied the place of force. *Regina v. Fletcher*, Bell C. C. at p. 66. The question was finally settled in *Rex v. Jackson*. *The principle is that when consent is obtained by fraud, the act does not amount to rape.* This results from the correct definition of the crime, which is the ravishing of a woman not against her will but *without her consent*. Judgment of Lord Campbell C. J. in *Regina v. Fletcher*, Bell C. C. at p. 71, post p. 259.

Although *Rex v. Jackson* was not considered as a satisfactory decision, it was held in several cases since, that if a man gets into bed with a married woman, and, by fraud, has connection with her, she believing him to be her husband, and therefore consenting to the connection, it is not a rape. In the first case, *Regina v. Saunders*, 8 Carrington & Payne, 265, on an indictment for a rape, it appeared that the prosecutrix and her husband had gone to bed, and that she soon fell asleep with her back towards her husband, and that afterwards she was awoke by feeling a hand passed around her, which turned her round; and she, supposing it to be her husband, made no resistance to that, or to the connection which immediately followed; but that while the connection was going on, she perceived by the person's breathing that it was not her husband, and immediately pushed him off her. The husband, had been obliged to go down stairs, where he remained a quarter of an hour. Gurney B. told the jury: "I am bound to tell you, that the evidence in this case does not establish the charge contained in this indictment, as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband." In the second case, *Regina v. Williams*, 8 Carrington & Payne, 286, it was opened that the prisoner had got into bed with the prosecutrix while she was asleep, and had penetrated her person before she was aware that it was not her husband, and that the prisoner persisted and went on to complete his purpose notwithstanding her resistance, after she had discovered that it was not her husband; and it was submitted, on this state of facts, that this case was distinguishable from *Rex v. Jackson*, as there the prisoner intended to desist if discovered, but that here he was determined, at all events, to effectuate his intention. It appeared however from the evidence of the prosecutrix, that the prisoner had got into her bed while she was asleep, and that she had permitted him to have connection with her, believing him to be her husband, and that she did not discover who he was till after the connection was over. Alderson B.: "That puts an end to the capital charge. The case of *Rex v. Jackson* is in point." In *Regina v. Case*, Temple & Mew C. C. at p. 324,

Alderson B. remarked with reference to *Regina v. Saunders*, and *Regina v. Williams*: "I cannot understand why it is not a rape or nothing."<sup>1</sup> In *Regina v. Francis*, 13 Upper Canada Queen's Bench, 116, the decision in *Rex v. Jackson*, and in *Regina v. Clarke*, was followed.

On the authority of the judgment delivered by Lord Campbell C. J. in *Regina v. Fletcher*, Bell C. C. at p. 71, post p. 259, Kelly C. B. reserved for the opinion of the Court of Criminal Appeal the case of *Regina v. Barrow*, Law Rep. 1 C. C. 156. The evidence of the prosecutrix was as follows: "I and my husband lodge together at William Garner's. We sleep up stairs on the first floor, and were in bed together on the night of Saturday, the 21st of June. I went to bed about 12 o'clock, and about 2 o'clock on Sunday morning I was lying in bed, and my husband beside me. I had my baby in my arms, and was between waking and sleeping. I was completely awakened by a man having connection with me, and pushing the baby aside out of my arms. He was having connection with me at the moment when I completely awoke. I thought it was my husband, and it was while I could count five after I completely awoke before I found it was not my husband. A part of my dress was over my face, and I got it off, and he was moving away. As soon as I found it was not my husband, I pulled my husband's hair to wake him. The prisoner jumped off the bed." On cross-examination she added, "Till I got my dress off my face I thought it was my husband. After he had finished I pulled the dress off my face. I was completely awakened by the man having connection with me and the baby being moved." On re-examination she said, "The baby was pushed on farther into the bed." Bovill C. J.: "We have carefully considered the facts as stated in this case. It does not appear that the woman, upon whom the offence was alleged to have been committed was asleep or unconscious at the time when the act of connection commenced. It must be taken therefore that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud. It falls therefore within the class of cases which decide that, where consent is obtained by fraud, the act done does not amount to rape."

There is a class of cases in which fraud has been held to supply the want of both force and violence. In *Regina v. Camplin*, 1 Denison C. C. 89; 1 Carrington & Kirwan, 746, the prisoner having given a girl of thirteen years of age liquor for the purpose of exciting her, she became quite drunk, and when she was in a state of insensibility, he violated her. A majority of the Judges held that he was guilty of rape. The principle on which the judgment proceeded was explained by Patteson J. who when he afterwards passed sentence upon the prisoner, said: "Your case comes within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both." 1 Carrington & Kirwan, at p. 749.

In the Addenda to 1 Denison C. C. there is the following note of the reasons for the decision in *Regina v. Camplin*, supplied by Parke B.:<sup>2</sup> "Of the Judges who are in favor of the conviction, several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the

<sup>1</sup> In these cases, the prisoners were convicted of an assault under 1 Vict. ch. 85, § 11.

<sup>2</sup> Lord Campbell C. J.: "That note is a very important one, and was evidently handed in to the reporter at the last moment." *Regina v. Fletcher*, Bell C. C. at p. 69.

accused knowing, at that time, that she is in that state; and Tindal C. J. and Parke B. remarked, that in the statute (Westminster 2, ch. 34) the offence of rape is described to be ravishing a woman *where she did not consent*, and not ravishing against her will. But all the ten Judges agreed, that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because he had attempted to procure her consent and failed, the offence of rape was committed." The three dissenting Judges appear to have thought that this could not be considered sufficiently proved.

The judgment of Lord Campbell C. J. in *Regina v. Fletcher*, Bell C. C. at p. 71, states the result of the authorities tersely and satisfactorily: "The question is, what is the real definition of the crime of rape, whether it is the ravishing a woman against her will, or without her consent. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. Camplin's Case seems to me really to settle what the proper definition is; and the decision in that case rests upon the authority of an act of Parliament. The statute of Westminster 2, ch. 34, defines the crime to be where 'a man do ravish a woman, married, maid, or other, where she did not consent neither before or after.' 2 Inst. 433. We are bound by that definition. It would be monstrous to say that, if a drunken woman returning from market lay down and fell asleep by the roadside, and a man, by force, had connection with her whilst she was in a state of insensibility and incapable of giving consent, he would not be guilty of rape."

In *Regina v. Case*, 1 Denison C. C. 580; *Temple & Mew C. C.* 318; 4 New Sessions Cases, 347; 4 Cox C. C. 220, the prisoner, a medical man, had connection with a girl of fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was then attending her, and the jury found that she made no resistance owing solely to the bona fide belief that such was the case; and he was held to be guilty of an assault, on the ground that her non-resistance was caused by his own fraud. Alderson B.: "The case seems quite undistinguishable from those in which it has been held that if a man possesses himself of a woman's person by fraud, it is equivalent to force: the objection that it amounted to rape was not taken."

In a case in the High Court of Justiciary in Scotland, in 1858, the evidence was, that S. went into the bed where D.'s wife was asleep, and had connection with her while she was asleep. Held that S. was not guilty of rape, inasmuch as such a crime implies that some force has been used to overcome the opposing will of the prosecutrix, and here no force was in fact used. But held, by Lord President Macneill and Lord Ivory, who dissented, that the force essential to the crime of rape is relative to the resistance offered, and where there is no resistance to be overcome, it is not necessary to prove the use of force. *Regina v. Sweeney*, 8 Cox C. C. 223. But see *Fraser's Case*, Arkley, 329.

In Tennessee and in Alabama the principle settled by *Rex v. Jackson* and *Regina v. Clarke* has been adopted. *Wyatt v. The State*, 2 Swan, 394. *Lewis v. The State*, 30 Alabama, 54. In *The State v. Shepard*, 7 Connecticut, 54, the precise point now under consideration was not raised nor considered by the court.

In *Commonwealth v. Fields*, 4 Leigh, 648, on an indictment on St. 1822, ch.



34, § 3, for an assault with intent to commit a rape, the jury returned a special verdict that the defendant, not intending to have carnal knowledge of a white woman *by force*, got into bed with her, and pulled up her night garment, which awaked her, using no other force, and judgment of acquittal was rendered.

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COMMONWEALTH *v.* MARSH.<sup>1</sup>

September Term 1830.

*Witness — Competency of Co-defendant in Criminal Cases.*

Where two are jointly indicted for uttering a forged note, and the trial of one is postponed, he is not a competent witness for the other.

IN these indictments the defendants were jointly charged with knowingly uttering a forged promissory note. Marsh was tried on both indictments, before Wilde J. The trial of Barton having been continued to the next term, he was offered as a witness on the part of Marsh; but was rejected. Marsh was convicted on both indictments.

If Barton was not rightly rejected, new trials were to be granted; otherwise, the verdicts were to stand.

*Dewey*, for the defendants. It is not sufficient, in order to disqualify a witness, that he is interested in the question, but he must be interested in the event of the suit. In this case the acquittal or conviction of Marsh can neither operate in favor of the witness, nor to his disadvantage. If a person is disqualified to be a witness on the part of the accused, because he is united with him in the indictment, the government may, at its pleasure, deprive the accused of all his witnesses. *Commonwealth v. Easland*, 1 Massachusetts, 15. 2 Starkie Ev. 747. *Bent v. Baker*, 3 Term R. 27.

*Davis*, Solicitor General, and *Morris*, for the Commonwealth, cited 3 Starke Ev. 1062; *Chapman v. Graves*, 2 Campbell, 333 note; *Sawyer v. Merrill*, 10 Pickering, 16; *Man v. Ward*, 2 Atkyns, 228; *Dougherty v. Dorsey*, 4 Bibb, 207; 1 Chitty Crim. Law, 605; 1 Phillpotts Ev. (N. York ed. 1816) 61, 62; *The People v. Bill*, 10 Johnson, 95; *Rex v. Locker*, 5 Espinasse N. P. C. 107; *Rex v.*

<sup>1</sup> 10 Pickering, 57.

Lafone, 5 Espinasse N. P. C. 154 ; Davis v. Levins, 1 Holt N. P. R. 275 ; The State v. Carr, Coxe, 1 ; Rex v. Fletcher, 1 Strange, 633.

WILDE J. drew up the opinion of the court. It is an inflexible rule of evidence, that parties of record, whether in civil actions or criminal prosecutions, are not admissible as witnesses. They are not suffered to testify in their own favor, nor are they compellable to furnish evidence against themselves. The rule is not founded exclusively on the ground of interest, but on that also of public policy. Thus, nominal parties, who may have no real interest in the question to be tried, and who are indemnified as to costs, are nevertheless excluded from testifying. And so in actions of tort, one of several defendants is not admitted to give evidence in favor of a co-defendant. The same rule is adopted in criminal prosecutions, even if the defendants are tried separately. This was decided in the case of *The People v. Bill*, 10 Johnson, 95 ; and there seems to be no reason or authority for adopting a different rule. If parties charged with an offence, were permitted to testify for each other, they might escape punishment by perjury. If, in the present case, Barton, whose trial was postponed, had been admitted as a witness for the defendant, he might have been acquitted ; and then, on the trial of Barton, the defendant, in his turn, might be admitted to testify ; and thus they would be allowed mutually to protect each other, and evade the ends of justice. In the case of *Rex v. Lafone*, 5 Espinasse N. P. C. 155, Lord Ellenborough carried the rule still further, and rejected the testimony of a co-defendant who had suffered judgment, which he held was incompetent evidence for the other defendant ; remarking that he had never known such evidence offered.<sup>1</sup> Such evidence however was offered and admitted in the case of *Rex v. Fletcher*, 1 Strange, 633, and it has been admitted in this commonwealth. After one of several defendants has been convicted, by his own confession, or otherwise, and the conviction does not make him incompetent, there seems to be no good reason why he should not be permitted to testify for or against the other defendants ; for, after conviction, he is no longer a party to the issue. But however this may be, it seems clear that the witness offered in the present case was incompetent, and was properly excluded.

*Motion for new trial overruled.*

<sup>1</sup> This case is not supported either by principle or authority. See 3 Russell on Crimes, 612 note. 4th ed.

REX *v.* SMITH.<sup>1</sup>

Easter Term 1826.

*Wife*—*When a Competent Witness for Co-defendant of Husband.*

On an indictment against several prisoners, the wife of any of them is inadmissible as a witness.

THE prisoners were tried before Mr. Justice Littledale, at the Spring assizes in the year 1826, for the county of Lincoln, on an indictment of burglary.

*Cobbey* and *Draper*, in their defence, each set up an alibi.

*Draper*, after having called and examined one witness to prove an alibi on his part, proposed to call his daughter in further proof of the alibi set up by him; but it appearing that she was the wife of the prisoner Smith, the learned judge thought that she could not be examined as a witness, and did not receive her evidence; for though she only came to speak as to Draper being at one place, which had nothing to do with Smith being concerned in the offence, yet her evidence would go to show that the witness for the prosecution was mistaken as to Draper, and then if she was mistaken as to one it would weaken her evidence altogether, and by that means the witness proposed to be called by Draper might benefit her husband.

The prisoners were all acquitted of the capital part of the charge, but found guilty of grand larceny, and the judge passed sentence upon them.

After the trial the judge had doubts whether he did right in rejecting the evidence of Draper's daughter, and therefore he submitted the case for the opinion of the Judges.

This case was considered in Easter term 1826, at a meeting of all the Judges, and they all thought her not competent (except Graham B. and Littledale J.) and that the conviction was right.

It has often been decided that a party to the same indictment is not a competent witness for his co-defendant, until he has been first either acquitted or convicted; and the rule is the same whether the defendants are tried jointly or separately. *The People v. Bill*, 10 Johnson, 95. *The State v. Mooney*, 1 Yerger, 431. *The State v. Smith*, 2 Iredell, 402. *Pullen v. The People*, 1 Douglass (Michigan) at p. 49. *Campbell v. The Commonwealth*, 2 Virginia Cases, 314.

<sup>1</sup> 1 Moody C. C. 289.

*Lazier v. The Commonwealth*, 10 Grattan, at p. 716. *Rex v. Duffy*, 1 Crawford & Dix C. C. 195. But a contrary doctrine has been determined in New Jersey, in a very recent, well considered case. The defendants were jointly indicted for conspiracy. One, who had not pleaded, was called as a witness for the government on the separate trial of his co-defendant. The rule so far as it relates to defendants tried jointly, "is," says Beasley C. J., who delivered the opinion, "of course, indisputable; but its extension beyond that point I do not think sustained by any decision which we are bound to receive as a common-law guide. With regard to the cases in this country which are adverse, I do not think they rest on any other ground than this erroneous supposition, that the doctrine exists in the common law as an inveterate usage. I can perceive no propriety in the exclusion of a co-defendant in a joint indictment on the separate trial of his companion, and his admission, which is of undoubted legality, if he and his co-defendant are indicted separately, because when criminals, though indicted together, are tried apart from each other, they are as much disconnected, in point of fact, as if the indictment were several. Under such circumstances, the testimony which the witness delivers cannot in any sense affect him in the remotest degree. The judgment of conviction or acquittal of the party on trial cannot be received in evidence when his own case comes to be heard, either for or against him. Such judgment cannot, in any respect, affect his own interests or prejudice his rights. The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis, and my conclusion therefore is that the witness in the present instance was properly sworn, and that, similarly situated, he could have been called by the defendant." *The State v. Brien*, 3 Vroom, 414 (1868).

In a very recent case in England, two persons were jointly indicted for murder, and were tried separately. It was decided, after the greatest consideration, that one was a competent witness against the other, although the witness had not been previously convicted or acquitted, nor had pleaded guilty. "In all such cases," said Cockburn C. J., "if it be thought necessary, where two persons are in the same indictment, and it is thought desirable to separate them in their trials, in order that the evidence of the one may be taken against the other, I think, in order to insure the greatest possible amount of truthfulness on the part of the person who is coming to give evidence under such remarkable circumstances, it would be far better that a verdict of not guilty should be taken first; or if the plea of not guilty is withdrawn and a plea of guilty taken, sentence should be passed, in order that the person coming forward to give evidence may do so with the mind free of all the corrupt influence which the fear of impending punishment and the desire to obtain immunity at the expense of the prisoner might otherwise be liable to produce in the mind of the witness." *Winsor v. The Queen*, 10 Cox C. C. 276; 35 Law Journal, Q. B. 157; 14 Law Times Rep. 567; Law Rep. 1 Q. B. 390. (1865). This question arose on error in the Court of Queen's Bench. Of course, the court could not take it into consideration, although each of the Judges expressed a decided opinion. But

afterwards, when a petition for a pardon was presented, the Home Secretary submitted the question to the fifteen Judges, and they were all of the opinion as stated above. Subsequently the Attorney General granted his fiat for a writ of error to the Exchequer Chamber, and the judgment was affirmed.

A party jointly indicted with others, and who has pleaded not guilty, cannot be a witness for the prosecution, while the record, so far as it concerns him, is undecided. *The King v. Ryan*, Jebb C. C. 5. Whenever, therefore, it becomes necessary to obtain the testimony of a defendant in a criminal trial as against his co-defendants, the proper course is to enter a nolle prosequi; *Rex v. Sherman*, Cases Temp. Hardwicke, 303; or to apply for a verdict of acquittal before opening the case. *Rex v. Rowland*, Ryan & Moody N. P. C. per Abbott C. J.; *Regina v. Owen*, 9 Carrington & Payne, 83; though the court, in its discretion, will direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculcating the party who is sought to be made a witness. *Commonwealth v. Eastman*, 1 Cushing, 189. *Regina v. O'Donnell*, 7 Cox C. C. 337. As soon as a prisoner has thus been acquitted he becomes competent to testify either for the prosecution, or for his former co-defendants. *Regina v. O'Donnell*, 7 Cox C. C. 341, 342, per Monahan C. J. 2 Taylor Ev. § 1223. 3d ed.

A defendant who has pleaded guilty is a competent witness, before sentence, for or against his co-defendant. *Commonwealth v. Smith*, 12 Metcalf, 238. *Regina v. George*, Carrington & Marshman, 111. *Regina v. Hinks*, 1 Denison C. C. 84; 2 Carrington & Kirwan, 462; s. c. as *Regina v. Williams*, 1 Cox C. C. 289. *Regina v. King*, 1 Cox C. C. 232. *Regina v. Arundel*, 4 Cox C. C. 260.

It has been established by a series of uniform decisions, that the *wife* of one of several defendants accused of a crime alleged to have been jointly committed, is an incompetent witness for any of his associates, when *all* of them are on trial. *Commonwealth v. Robinson*, 1 Gray, 555, 560. *Commonwealth v. Easland*, 1 Massachusetts, 15. *The State v. Burlingham*, 15 Maine, 104. *Commonwealth v. Manson*, 2 Ashmead, 31. *Rex v. Frederick*, 2 Strange, 1095. *Rex v. Locker*, 5 Espinasse N. P. C. 107. *Rex v. Hood*, 1 Moody C. C. 281. *Regina v. Denslow*, 2 Cox C. C. 230. "Yet where the grounds of defence are several and distinct," says Greenleaf, "and in no manner dependent on each other, no reason is perceived why the wife of one defendant should not be admitted as a witness for another." 1 Greenl. Ev. § 335, cited and approved in *The State v. Worthing*, 31 Maine, 62, 63. And where Sills, Fellows, and Johnson were jointly indicted for burglary, and it was proposed to call the wife of Sills as a witness for Fellows, to prove that she brought to Fellows' house part of the stolen property that was found there; Tindal C. J. held that she was a competent witness for that purpose, and she was examined accordingly. *Regina v. Sills*, 1 Carrington & Kirwan, 494. So where two prisoners were jointly indicted for burglary, and it was proposed to call the wife of one of them to prove an alibi for the other, and this was objected to on the part of the prosecution on the authority of *Rex v. Smith*, Maule J. held that, though she could not be examined for her husband, she certainly might for the other prisoner. *Regina v. Moore*, 1 Cox C. C. 59. So where two prisoners were jointly indicted for stealing potatoes,

and some potatoes were found in the apartment of each, and one of them called the wife of the other to prove that the potatoes found in his apartment were not the property of the prosecutor; Wightman J. after consulting Cresswell J. said: "The point is a very nice one, but I am inclined, though with considerable doubt, to admit the evidence, and upon these grounds; although the prisoners are jointly indicted, the offence is distinct and severable. It differs from Smith's Case; for here evidence that one prisoner did honestly obtain the potatoes found in his apartment does not necessarily benefit the other prisoner. The defence of each is distinct, and it would be hard to say that one should be precluded from his defence because it might by some remote possibility benefit the other. I shall receive the evidence, but with considerable doubt." *Regina v. Bartlett*, 1 Cox C. C. 105.

And with reference to *Rex v. Smith*, Mr. Phillpotts observes that it "must be understood as having been decided on its own particular circumstances, and not as warranting the conclusion that where prisoners set up a separate and distinct defence, the wife of one prisoner cannot in any case be a witness for another prisoner." 1 Phillpotts Ev. p. 75. "The authority of *Rex v. Smith* and *Rex v. Hood*, 1 Moody C. C. 281, seems open to some doubt," says Mr. Greaves, "as they infringe the rule that it is only where there is a certain interest in the result that the witness is incompetent, and the utmost that can be said is, that in such cases the evidence has a tendency to produce such a result. It is also a great anomaly that a witness should be competent for a prisoner if tried separately, but incompetent for him, if tried jointly with the witness's husband." 3 Russell on Crimes, 628 note. 4th ed.

It has also been held, that where several are jointly indicted for an offence, which may be committed either by one or more, and they are tried *separately*, the wife of one defendant is a competent witness for the others; and to give them the benefit of her testimony, separate trials will be awarded them, except in cases of conspiracy and other joint offences. *Commonwealth v. Manson*, 2 Ashmead, 31. *The State v. Moffit*, 2 Humphreys, 99. *The State v. Worthing*, 31 Maine, 62. *The State v. Anthony*, 1 McCord, 286. *Regina v. Allen*, 1 Crawford & Dix C. C. 104. See *Jones v. The State*, 1 Kelly, 610.

And a contrary doctrine has been held. In *Pullen v. The People*, 1 Douglass (Michigan) 48, the court said: "In *Commonwealth v. Marsh*, Wilde J. states as a reason why one of two co-defendants jointly indicted for altering a forged note, and whose trial had been postponed, was an incompetent witness for the other, that 'if parties charged with an offence were permitted to testify for each other, they might escape punishment by perjury.' By obtaining separate trials, each defendant in his turn might be admitted to testify, and thus they would be allowed mutually to protect each other, and to evade the ends of justice." If the interest of a co-defendant in the investigation of a crime in which he is charged to have participated, is such as to render him incompetent, surely his wife, or if the wife be indicted, her husband, would be incompetent for the same reason. But we are not without authorities on the question presented by this case. In *Commonwealth v. Easland*, 1 Massachusetts, 15, five persons were indicted for assault and battery, and were on trial together. The wife of one of the defendants was offered as a witness in behalf of the other four. The court ruled unanimously that she could not be examined; and remarked, that

if the other defendants wished for the benefit of her testimony, they should have moved to be tried separately from her husband. This remark was a mere dictum, the question of the competency of the wife on their separate trial not being before the court. This case is cited 1 Cowen & Hill's Notes to Phillipps on Evidence, 72, where the authors not only question the authority of this dictum, but cite the case of *The People v. Bill*, 10 Johnson, 95, as establishing the doctrine that one defendant was not a competent witness for his co-defendants where they severed; from which they deem it a necessary inference that the wife of such defendant would also be incompetent."

But though the rule of exclusion is thus stringent where a married person is criminally accused in conjunction with others, it is clear that where a married defendant has pleaded guilty, *Regina v. Thompson*, 3 Foster & Finlason, 824, per Keating J.; or is entirely removed from the record, whether by a verdict pronounced in his favor, or by a previous conviction, his wife may testify either for or against any other persons who may be parties to the record. Alderson B. in *Regina v. Williams*, 8 Carrington & Payne, 284, and in *Hawkesworth v. Showler*, 12 Meeson & Welsby, at pp. 49, 50. 2 Taylor Ev. § 1230. And the mere hope that, by giving evidence against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime, will by no means affect her competency, though it may and indeed must shake her credit. *Rex v. Rudd*, 1 Leach C. C. 127. It seems scarcely necessary to add, that the wife of a prosecutor in a criminal proceeding would not be excluded from giving evidence either for the government or for the defendant. *Rex v. Houlton*, Jebb C. C. 24.

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### THE KING *v.* THE INHABITANTS OF ALL SAINTS, WORCESTER.<sup>1</sup>

Easter Term 1817.

#### *Husband and Wife — When Competent Witnesses.*

On a question of settlement, the pauper having been removed to her maiden settlement, respondents called A. to prove her marriage with C., in order to get rid of the effect of a subsequent marriage of C. with the pauper.

*Held*, that A. was a competent witness, for C. not having been called as a witness, she did not contradict him, and her evidence could not be used to criminate him.

UPON appeal, the sessions confirmed an order for the removal of Esther Newman, otherwise Esther Willis, from the parish of Cheltenham, in the county of Gloucester, to the parish of All Saints, in the city of Worcester, subject to the opinion of this court, on the following case:—

<sup>1</sup> 6 Maule & Selwyn, 194.

The appellants having produced the pauper, the counsel for the respondents began their case by calling a witness, named Ann Willis, for the purpose of proving that she had been married in Ireland, to one George Willis. The counsel for the appellants objected to the competency of this witness, declaring themselves prepared with evidence of the subsequent marriage of the same George Willis to Esther, the pauper; but the court determined to admit the witness. She proved her own marriage to George Willis, about fourteen years ago, and that a paper, which she stated to be a certificate of that marriage, had been given her by the minister, and by her to a Mr. Farren, the overseer of the parish where she then resided, and Farren was in court, ready to prove his having received the said certificate of the said witness, and having lost it, and he was ready also to have given parol testimony of its contents. Another witness proved that George Willis and the first witness cohabited together as man and wife, and had three children then alive; that the settlement of the said George Willis was in the parish of Sandhurst, where he was born; that he had been lately apprehended as a vagrant, for leaving the said Ann, his wife, chargeable to that parish, and convicted of that offence at the quarter sessions for this county; that Esther, the pauper, had gained a settlement in the appellant's parish in her own right, as a single woman, about three years ago, but had since, on the 28th December 1815 married the said George Willis; which fact was proved, as well by the said pauper as by another witness, who was present at their marriage. The counsel for the appellants submitted to the court that the evidence of Ann Willis should be struck out, which the court refused.

*Scarlett and Campbell*, in support of the order of sessions, argued that Ann Willis was a competent witness to prove her marriage with George Willis; and they said, that in order to maintain this position, it was not necessary to dispute the rule, that husband and wife cannot be witnesses for each other nor against each other, Buller N. P. 286, provided the rule were limited to cases where the interest of husband and wife is the matter in controversy, as where either of them is party to the record. *Bentley v. Cooke*, cited in *Rex v. Cliviger*, 2 Term R. 265. But suppose an issue between A. and B., and A. calls a witness, who proves certain facts, and also calls the wife of that witness, with a view of confirming his evidence; if the wife, instead of confirming, should contradict



her husband, this testimony, according to the argument below at the sessions must be rejected, otherwise it may tend to show her husband guilty of perjury. But would it not be a strange anomaly in the law if the competency of a feme covert to be a witness should depend upon whether her evidence would or would not agree with the evidence of her husband, his interest not being in litigation? It seems indeed as if some such doctrine had led to the decision of *Rex v. Cliviger*, 2 Term R. 263, where, upon a question touching the settlement of A. and B. his wife, A. having denied a former marriage with C. C. was held an incompetent witness to prove that marriage. Or, if that was not the ground of the decision, it was perhaps upon the principle that husband and wife shall not give evidence which may tend to criminate each other; a principle upon which the ruling of Holt C. J. in *Broughton v. Harpur*, 2 Lord Raymond, 752, was probably bottomed, though the report puts it on the ground of interest. But, in either way of considering it, the decision in *Rex v. Cliviger* cannot avail except in cases where the interest of husband or wife is concerned in the issue. With respect to the wife's contradicting the husband, it may be observed here that the husband had not given evidence, as in the case of *Rex v. Cliviger*; so that the fact did not admit of this objection.

*Jervis*, *Taunton*, and *Twiss*, contra, argued that *Rex v. Cliviger* was decisive of this question; for although, in that case, the husband was one of the parties included in the order of removal, and had been called as a witness, and denied his former marriage, in which respect it differs from the present case, yet having been decided upon the principle that the law does not permit husband and wife to give evidence that may even tend to criminate each other, that decision entirely disposes of the present case. In delivering judgment, Ashhurst J. is reported to have said, that "a marriage in fact had been proved with one woman, then another woman was called to prove that she had been before married to him, and was his lawful wife." So, in substance, is the case at bar; for although the respondents, contrary to the usual course of proceeding, by first examining the pauper, who would have proved her marriage, began by calling the first wife, to prove that she had before been married to and was the lawful wife of the same man, yet this course of examining the witnesses *inverso ordine*, and by a kind of shift, to evade the rule of law, will not alter the nature of the evidence; for that would be to make the rule of law depend-

ent upon the order observed in marshalling the evidence. When therefore it appeared in the sequel that the evidence had been improperly received, the justices should have struck it out. The case of *Broughton v. Harpur* is in accordance with *Rex v. Cliviger*; and it is also laid down by Lord Hale (Hale P. C. 301) that a wife is not bound to give evidence against a third person, if her husband be concerned, though it be not directly against him. It is not necessary upon the present occasion to carry the doctrine so far, because here the wife's testimony might directly have affected her husband; for the justices might, upon that testimony, have issued a warrant for his apprehension. As where upon issue joined in a civil action, whether felony or not, if the affirmative be found, such finding will, it is said, lay a good foundation for proceeding criminally against the party.

LORD ELLENBOROUGH C. J. With the best attention I have been able to give to this case, I cannot discover any incompetence of the first wife to give evidence touching the fact of her marriage. At the period of the proceeding, when she was called, she contradicted no denial then in evidence of the existence of the marriage, nor do I say that it would make any material difference if she had. At the time when she proved the fact of marriage, it did not appear that guilt would thereby be imputable to her husband. She did not refuse to be examined; and she proved the fact of the celebration of a marriage fourteen years before, with a person under whom the pauper's title to a settlement was to be derived. She affirmed that he was her husband. How does this criminate him? Does it contradict any thing which he had sworn to before, so as to involve him in the crime of perjury? Not at all. Does it even relate to a matter on which he had given previous evidence? By no means. Then the question is, whether this is not a competent witness to prove her marriage in the first instance? Her being the wife presents no objection to her proving the marriage. \* \* \* The objection rests only on the language of *Rex v. Cliviger*, that it may tend to criminate him; for it has not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. The passage from Lord Hale has been pressed upon us, where it is said the wife is not bound to give evidence against another in a case of theft, if her husband be concerned, though her evidence be material against another, and not directly against her

husband. Admitting the authority of that passage, it assumes that the husband was under the criminal charge, that he was included in the *simul cum aliis*. But if we were to determine, without regard to the form of proceeding, whether the husband was implicated in it or not, *that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision as I think would go beyond all bounds*, and there is not any authority to sustain it, unless indeed what has been laid down, as it seems to me, somewhat too largely, in *Rex v. Cliviger*, may be supposed to do so. \* \* \* I would observe that, by the present decision, the court does not mean to break in on the rule, founded in the policy of the law, that husband and wife shall not be permitted to be witnesses for or against, or to criminate each other; but before I pronounce that it is a good objection to the competency of either to be a witness, that his or her testimony may produce some latent possible effect, which, in its result, may occasion an inconvenience to the other, I shall require some graver authority or reason than I am acquainted with at present. It may be remarked here, that at the stage of the inquiry when this witness was examined, it was not in proof that the second marriage had taken place; undoubtedly therefore she was an unexceptionable witness at that time. To strike out her evidence, because by reason of what was afterwards proved, of the possible inconvenience which might result to her husband from the disclosure, would, in my opinion, be introducing a dangerous laxity in dealing with evidence. It would reduce all prior evidence in a cause to a precariousness dependent upon that which follows, whether it should remain part of the evidence on the notes or not. It seems to me therefore that the evidence was well received at the time when it was produced, and that the subsequent testimony did not render the witness incompetent, so as to strike out her evidence *ab initio*.

BAYLEY J. On the best consideration which I can give to this case, it appears to me that Ann Willis was a competent witness; and I found this opinion not upon the order of time in which she was called, for, in my judgment, she would have been equally competent after the second wife had given her testimony. It does not appear that she objected to be examined, or demurred to any ques-

tion. If she had thrown herself on the protection of the court, on the ground that her answer to the question put to her might criminate her husband, in that case, I am not prepared to say that the court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the court. But, as she did not object, I think there was no objection arising out of the policy of the law; because, by possibility, her evidence might be the means of furnishing information, and might lead to inquiry, and perhaps to the obtaining of evidence against her husband. It is no objection to the information, that it has been furnished by the wife. In *Rex v. Cliviger*, the decision seems to have been put upon two grounds; one, that the husband having been examined before, the wife was called to contradict his evidence, and thus to prove him guilty of perjury. The other ground was this: that her evidence would have a tendency to charge him with bigamy, or might lead to a charge for that crime, and cause the husband to be apprehended. I am not sure that the import of the expression, "tendency to criminate," was very accurately defined in that case. It was probably not understood as meaning that the wife's evidence could be used against her husband, for we know that this could not be so. It has indeed been argued that the wife's evidence in this case might operate as a direct charge against her husband, by analogy to what has been said may be practised in a civil action, where, if the issue be upon a felony, and the felony proved, the party against whom it has been proved may be apprehended upon that evidence; but supposing that to be so, the present is not an analogous case, and nothing which the wife proved on this occasion could be the direct means of founding a prosecution against her husband, although it might afford the means of procuring evidence against him. But such a collateral consequence is not a sufficient objection. With respect to the case of *Broughton v. Harpur*, the ground on which the chief justice rejected the witness does not appear very clearly upon the report; the objection to her testimony seems to have been put on the ground of interest. At the period when that was so ruled by the chief justice, the authorities were contradictory as to the nature or degree of interest which rendered a witness incompetent, whether it need amount to an interest in the event of the suit; but in later times this rule has been better established, the courts inclining to let the objection on the score of interest go rather to the credit

than the competency. Therefore, on the ground that the admission of this witness does not interfere with the policy of the law, as it concerns marriage, I think she was competent.

ABBOTT J. I also am of opinion that this witness's testimony was well received, and ought not to have been struck out. The question does not arise here, as to the admissibility of husband or wife to contradict the testimony which has been previously given by the other, and I therefore abstain from saying any thing upon that point. Complaint, indeed, has been made, in the progress of the argument, of the course of proceeding pursued at the sessions by the respondents, in marshalling the evidence, in order to steer clear of *Rex v. Cliviger*; but it is plain that the appellants did not propose to call the husband, and therefore could sustain no prejudice on that account. But the opinion which I have now formed would have been the same if a different course had been followed; for instance, suppose the respondents had begun by proving the pauper's maiden settlement, and the appellants had answered that by proving her marriage with Willis, and then the respondents had called the first wife to prove the former marriage, I should have been of opinion that she was competent to make such proof; so that the order of proceeding, in my judgment, made no difference. Her evidence upon this occasion can never be received against her husband, nor can the decision of the sessions be used against him. They can found neither a charge, nor the evidence of any charge, against him. So that it may properly be said of her evidence, that it has not any tendency to criminate him, provided that expression be understood with the limitation which I affix to it, that is, to criminate him in the course of some proceeding, in which a crime is imputed to him. With this qualification, I give my assent to the expression; but if it is to be carried further, with all my respect for the learned Judges who decided *Rex v. Cliviger*, I cannot but say that I know not what limitation is to be given it.

*Order of sessions confirmed.*

The rule at common law, with its exceptions, that a husband or wife is not a competent witness for or against each other, in a civil or criminal case, has been long established. The reason and policy of this rule were discussed and questioned in a recent case in the Court of Queen's Bench, by Mr. Justice Erle, in the usual clear and forcible manner of that learned judge: "The law relating to the exclusion of evidence on account of interest," he says, "gave effect to the principle of uniting the interest of husband and wife. If the husband was

excluded on account of interest, so was also the wife on account of her united interest; and if the capacity of the husband was restored, the wife became thereby also capable. Although the wife had no direct interest during coverture in personal property, she was taken to have an indirect interest, derivative from that of her husband. The party to a suit was both excluded and exempted on account of his interest. For the same reason, and from the same union of interest, the wife of a party was also exempted and excluded. If capacity was restored to the parties by judgment by default, by nolle prosequi, or otherwise, the capacity of the wife was also restored thereby. It seems to me to follow, that when the incapacity of parties is taken away by statute, the incapacity of the wives of parties should also cease, and so the union of capacity or incapacity be still maintained.

“This brings me to the question whether there was any other principle for excluding the wife of a party, besides this union of interest and privilege between husband and wife. Upon the affirmative side, authorities are cited for the exclusion of the wife, with a view to preserving the peace of families. They are collected in 2 Taylor on Evidence, p. 899, where it is said, that the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and that the confidence subsisting between husband and wife should be sacredly cherished. There is no doubt that the law most carefully protects the interests connected with marriage, and that it established the union of interest above mentioned for the purpose of domestic union, and excluded the testimony of the wife where the husband was excluded on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application; but if they are carried beyond this limit, and are supposed to introduce the tendency to domestic discord as a ground of exclusion, they will be found to be contrary to the known principles of evidence, and to be incapable of being consistently applied. For if this ground of exclusion existed, it would apply to other witnesses as well as to parties, their domestic peace being equally important. *But it is clear, with respect to witnesses not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension as freely as if the marriage was null.*

“Even if it could be supposed that the law regarded only the domestic peace of parties and protected their confidence, still the supposed ground of exclusion is not consistently applied; for if a husband is assaulted or libelled, he may seek redress either by action or indictment. In either form, he is in substance the party. If he proceeds by action, he and his wife were incompetent. If by indictment, both are admissible, either to corroborate or contradict or discredit each other. Now, if the principle of excluding the wives of parties was the protection of domestic peace and confidence, the wife ought to be excluded equally in both cases; but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil court to be neglected in the criminal court.

“With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times, but no

such principle has been brought into practice. The decisions excluding the wives of parties have been accompanied with general declarations in favor of such protection. But as the exclusion extended to all the testimony of the wives of parties, whether it was confidential or not, and as no protection was given to conjugal confidence, in respect of the wives of witnesses not parties, who are as much within the reason of the rule, if it existed, as the first-mentioned class, I think the rule has not yet been established.

“As to the authorities, most of the decisions in favor of the exclusion of the wives of parties were given in cases where the husband was excluded, and so are consistent with the principle of union of admissibility. In *Bentley v. Cook*, 3 Douglas, 422, the wife was plaintiff, and so the husband was excluded. In *Davis v. Dinwoody*, 4 Term R. 678, the wife's trustees were plaintiffs on her behalf, and the husband was excluded. And thus, in *Hawkesworth v. Showler*, 12 Meeson & Welsby, 45, the wife of Boyce was excluded from giving evidence for Showler, because she was the wife of a party to the issue under trial, who was incapacitated either for or against himself, and the same incapacity extended to the wife. The decisions excluding the wife where the husband was not excluded, upon some general purpose of promoting conjugal peace, appear untenable. In *Broughton v. Harpur*, 2 Lord Raymond, 752, the question in ejectment was, whether the plaintiff was son and heir of Hannah Jacques, and the first wife of Jerome Jacques was called by the defendant, to prove that his supposed marriage with Hannah was null, because she had been previously married, and was still alive. She was rejected, not on the ground, as mentioned in the report, that she swore to her advantage to get a husband, but on the ground, as mentioned in some later cases, that she would criminate her husband of bigamy, and in others, that she would occasion dissension with her husband. But her evidence would operate nothing in regaining her husband, nor would it criminate him more than the public offer of it, and dissension was not probable, and according to the law, as now settled, the witness would be admitted. In *Rex v. Cliviger*, 2 Term R. 263, upon a question of the settlement of a woman as a wife, the former wife of the alleged husband was held inadmissible to prove the former marriage and contradict the husband, because it might tend to criminate him of bigamy and perjury. Here also the public offer of the evidence had all the tendency that the evidence would have had; and here also evidence essential for ascertaining the truth was excluded, lest a tendency should be created which already existed. The principle of exclusion laid down in this decision was received with dissent by the court in *The King v. All Saints, Worcester*, and in *Rex v. Bathwick*, 2 Barnewall & Adolphus, 639, and in these cases the exclusion of the wife was said to be confined to cases where the husband was a party. They therefore in effect deny any direct ground of exclusion on account of domestic peace as applicable to all witnesses. In *O'Connor v. Majoribanks*, 4 Manning & Granger, 435, the widow was held incompetent to prove the authority of her deceased husband to pledge some property for a loan, on the ground that confidential communications between husband and wife should be protected; and although the communication in question was not confidential, but intended to be divulged, the court thought it necessary to exclude evidence of all communications, to secure the exclusion of those which were confidential. I may be allowed to doubt this necessity, and to

inquire whether it is satisfactory to sacrifice the interest of truth, by excluding essential evidence, for the sake of protecting a confidence which never existed. These cases lead me to the conclusion, that, from the union of interest between husband and wife, there was a union of incapacity, and upon a restoration of capacity to the one, the other is also rendered admissible.

“If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information, as a means for finding truth, is absurd. It is not doubted that the wives often possess essential information, as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness. If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law; these evils are certain, and if the notion of a compensating good in the promotion of domestic happiness, by rendering the wife powerless as a witness, be analyzed, I believe it will be found illusory. The idea, that husbands generally would suborn their wives to perjury and persecute them if they spoke truth, is to my mind unworthy of the time. There is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses. And if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a means for protecting the peace of his family and the sanctity of his marriage, was better than administering the law according to truth. These observations apply to the present case; for the husband was examined, and did not understand the matters in question, which had been managed by his wife. If she had been excluded, the verdict would have been for the plaintiff, and the defendant would have been made liable to a demand contrary to truth.” *Stapleton v. Crofts*, 18 Queen’s Bench, at pp. 372–378. And see *Barbat v. Allen*, 7 Exchequer, 609.

In *Rex v. Bathwick*, 2 Barnewall & Adolphus, 639, the rule laid down in the principal case was discussed and affirmed. The facts in the two cases were similar. Lord Tenterden C. J. delivered the judgment of the court: “First, we are of opinion that the witness Mary, assuming her to be the first and lawful wife of W. T. Cook, was a competent witness. The question arose on the settlement of another woman, considered to be the wife of Cook. Cook was examined, and proved his marriage with this woman; but he was not asked, and did not say, that he had not been previously married to the witness Mary. The witness Mary was afterwards called, to prove her previous marriage with this person. In deposing to this marriage, she did not contradict any thing that he had said. I notice this fact; but we do not mean to say that, if she had been called to contradict what he had sworn, she would not, in a case like this, have been a competent witness to do so. It is not necessary to decide that question at present; but it may well be doubted whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called. In the present case however the witness not having been called to contradict her husband, and her testimony not being inconsistent with the fact to which he had deposed, her incompetence, if it can be established, can be so only upon the authority of the case of *Rex v. Cliviger*, 2



Term R. 263. The authority of that case was much shaken by the decision of the case in *The King v. All Saints, Worcester*, in which Lord Ellenborough said (The learned judge here quoted from the opinion of Lord Ellenborough, in the text, the passage included in the asterisks, . . . ante pp. 269, 270, and proceeded): The decision in the case of *Rex v. Cliviger* appears to have been founded on a supposed legal maxim of policy; namely, that a wife cannot be a witness to give testimony, in any degree, to criminate her husband. This will undoubtedly be true in the case of a direct charge and proceeding against him for any offence; but in such a case she cannot be a witness to prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true, that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any decision of the Court of Session, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether *res inter alios acta*; neither the husband nor the wife has any interest in the decision of the question; and the interest of the parish of Pancras required that the illegality of the second marriage should be established if it was in fact illegal."

"It must be observed," said Merrick J. in a very recent case, "that in each of the cases, *The King v. All Saints, Worcester*, and *Rex v. Bathwick*, the testimony of the witness had no direct tendency to criminate the husband, inasmuch as, with respect to the fact concerning which the testimony was given, he was entirely innocent. In the first marriage to which the evidence applied, and for the proof of which it was admitted, he was certainly guilty of no offence; but this fact constituted a necessary link in the chain of evidence by which the nullity of the second, and his guilt in contracting it, was to be established." *Commonwealth v. Sparks*, 7 Allen, at p. 535.

In 3 Russell on Crimes, 631, 4th ed., the case of *Rex v. Gleed*, Gloucester Lent Assizes 1832, is reported from the MSS. of Mr. Greaves, and is here copied. On an indictment for stealing wheat, Eliza Ellis was called on the part of the Crown, to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton J. doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband, by causing a charge to be made against him. *The King v. All Saints, Worcester*, and *Rex v. Bathwick*, were cited. Taunton J. . "I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale.<sup>1</sup> In *The King v. All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately." Having consulted Littledale J., the learned judge added: "We both agree in opinion, that the witness is incompetent. We think *The King v. All Saints, Worcester*, very distinguishable. There, at the time when the wife was examined, there was nothing in her evidence to criminate her husband. Here, the evidence would directly charge the husband with being a principal; and although there is no prosecution pending, her evi-

<sup>1</sup> "I am not aware," says Mr. Greaves, "of the passage referred to by the learned judge, but see 2 Hale P. C. 279, and 1 Hale P. C. 301." 1 Hale P. C. 301, is cited in the argument, and referred to by Lord Ellenborough C. J. in *The King v. All Saints, Worcester*, ante p. 269.

dence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received."

In *Regina v. Halliday*, Bell C. C. 257; 8 Cox C. C. 298, Halliday was charged in the first count, with obtaining money from the trustees of a savings bank, by falsely pretending that a document, presented to the bank by Eliza, the wife of D. Thomas, had been filled up by his authority; the second count was similar as to another document; and a third count charged Halliday and Eliza Thomas with a conspiracy to cheat the bank; but she was not tried with Halliday. The evidence of D. Thomas was essential to prove that he had given no authority to fill up the documents; but it was objected on the authority of the preceding case, *Rex v. Gleed*, that he was incompetent to prove his wife guilty of a conspiracy, or even to prove the counts for false pretences; but Byles J. thought his evidence admissible on all the counts. The jury found a verdict of guilty on the first count only. And, on a case reserved, it was held that the evidence of the husband was properly received in support of the first count. Pollock C. B.: "The question is, whether the evidence of the husband was admissible in support of the first count. His evidence, no doubt, tended to show that his wife had acted unlawfully and criminally; but the first count contains no charge against the wife; and indeed on this indictment she was not charged at all, although she was involved in the conspiracy charged against the prisoner in the third count. Though that is so, it does not prevent the husband's evidence from being admissible."

In *The State v. Gardiner*, 1 Root, 485 (1793), which was an information charging the defendant with having committed adultery with Anna Clark, the wife of Samuel Clark, the prosecution offered the husband to prove the fact. By the Court: "He cannot be admitted. In a prosecution against the wife, clearly he could not be a witness, and in testifying to the criminality of the prisoner he must necessarily testify to the criminality of his wife; further, he may be interested in laying a foundation, by his testimony, for a divorce." It is to be observed, that this information charged the defendant alone, and not *jointly* with the wife.

In *The State v. Welch*, 26 Maine, 30 (1846), on a state of facts precisely like those in *The State v. Gardiner*, a like decision was made. Tenney J. in delivering the opinion of the court said: "If there is soundness in the reason which is given in the books, for holding incompetent the husband or the wife to give, against each other, evidence, because it may be the 'means of implacable discord and dissension between them,' it is certainly difficult to perceive how that discord and dissension will fail to arise, when, in collateral proceedings, testimony should be given by one which charges directly upon the other the same crime for the commission of which the party on trial is indicted. On principle and authority, we think the witness incompetent."

In *Commonwealth v. Sparks*, 7 Allen, 534, a majority of the court were of opinion that the determination in *The State v. Welch* "constitutes a precedent which it is right to follow and sustain." "It has never been determined," said Merrick J. in delivering the opinion, "that a husband or wife is admissible as a witness in any collateral proceeding to testify directly to the commission of any criminal act of the other. Nor ought such testimony to be received in any pro-

ceeding or upon any trial; for, as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them, its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against each other is founded."

But although, in these cases, the wife will be permitted to testify against her husband, it by no means follows that she will be *compelled* to do so; and, from the judgment of Mr. Justice Bayley, in the text, it seems that the better opinion is, that she may throw herself upon the protection of the court, and decline to answer any question which would tend to expose her husband to a criminal charge. *Cartwright v. Green*, 8 Vesey, 405. 2 Taylor Ev. § 1234.

In all actions, suits, and other proceedings between third parties husbands and wives will be permitted to *contradict*, and even to *discredit*, each other as freely as if the marriage was void. *Stapleton v. Crofts*, 18 Queen's Bench, at p. 368, per Lord Campbell, and at p. 373, per Erle J., and ante p. 273. Per Lord Ellenborough, in the text, ante p. 270. *Rex v. Bathwick*, per Lord Tenterden, 2 Barnewall & Adolphus, at p. 646, and ante p. 275. *Annesley v. Earl of Anglesea*, 17 Howell's State Trials, 1276. Indeed, if this were not the law, great injustice might be done; since the competency of the witness would then depend on the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance of his wife having been previously called on the part of the plaintiff, though, had the defendant been entitled to begin, the husband would have been examined, and the wife rejected. 2 Taylor Ev. § 1235. In Ireland it has been held by all the Judges, that it is no objection to the evidence of a wife, that she is brought to contradict the testimony of her husband, even where he is the prosecutor of an indictment. *Rex v. Houlton*, Jebb C. C. 24.

The subject of the competency of a wife to give evidence against her husband, was much considered in the reign of Charles I. An exception was made to the general rule that a wife was not admissible as a witness against her husband in the case of personal wrongs of the wife. That arose partly on account of the mischief that would result if evidence could not be got in such cases where great brutality may have existed, partly from necessity, and because the wife was the real party prosecuting, and ought to be heard. *Crompton J. in Reeve v. Wood*, 10 Cox C. C. at p. 59. In *Regina v. Smith*, Leigh & Cave C. C. at p. 622, Blackburn J. observed during the argument: "The statement of a dying person as to the cause of death is admitted on the same ground as evidence of a wife against her husband; viz. as being often the only evidence obtainable." The Judges determined that Lord Audley's wife might give evidence against him, for having aided one of his servants in committing a rape upon herself. The Judges held, that where a wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness: and a curious reason assigned is, that in such a case a villain may be a witness against his lord. 3 Howell's State Trials, 402, 413; Hutton, 115, 116. This case has been denied to be law, but is now established by the highest authorities. 3 Russell on Crimes, 633 note. 4th ed. So on the trial of an indictment for an assault and battery upon her, *Rex v. Azire*, 1 Strange, 683, by Lord Raymond, on the authority of Lord Audley's Case; *The State v. Soule*, 5 Greenleaf, 407; or, for maliciously shooting at her, *Whitehouse's*

Case, 3 Russell on Crimes, 633, 4th ed.; or attempting to poison her; *Rex v. Jagger*, 3 Russell on Crimes, 633, 4th ed.; *The People v. Northrup*, 50 Barbour, 148, she is a competent witness. And it is now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other. 1 East P. C. ch. 11, § 5, p. 455. In the Wakefields' Case, Hullock B. said: "I take it, it is quite clear now that a wife is a competent witness against her husband in respect of any charge which effects her liberty and person." See the Trial, published by Murray, 8 vo. London, 1827, at p. 257. But though a competent witness, it is not indispensable that the wife should be called. *Regina v. Pearce*, 9 Carrington & Payne, 667. And Mr. Justice Holroyd seems to have thought that the husband or wife could only be admitted to prove facts which could not be proved by any other witness. Whitehouse's Case, 3 Russell on Crimes, 633. 4th ed. See *Regina v. Pearce*, ubi supra, to the same point. But it is clear that this is restricting the rule within too narrow bounds. *The People v. Northrup*, 50 Barbour, at p. 149. And in *The State v. Davis*, 3 Brevard, 3, the wife was admitted as a witness against her husband, on the trial of an indictment for an assault and battery upon her, on the ground that no other person was present when the offence was committed. But the language of the court does not so restrict the rule. The wife may also exhibit articles of the peace against her husband, in which case her affidavit shall not be allowed to be controlled and overthrown by his own. *Rex v. Doherty*, 13 East, 171. Lord Vane's Case, 13 East, 171 note; 2 Strange, 1202. 2 Taylor Ev. § 1236, note.

The rule is confined to cases in which a personal wrong is done to the wife in the sense of the above decided cases. *The State v. Berlin*, 42 Missouri, 572. Thus a wife is not an admissible witness against her husband in support of a charge of desertion of wife and children preferred by the parish under the Vagrant Act, 5 Geo. IV. ch. 83. Crompton J.: "In the present case there is nothing that can be called an injury to the person of the wife; it is only a crime against the parish, and it is the fact of her becoming chargeable to the parish that makes the husband liable. It does not fall within the rule of necessity, for there are many other persons by whom the case may be made out without her evidence." *Reeve v. Wood*, 5 Best & Smith, 364; 10 Cox C. C. 58. Upon an indictment against the husband for subornation of perjury, in procuring another person to commit perjury in a judicial proceeding in which she is a party, she cannot be a witness for the prosecution. *The People v. Carpenter*, 9 Barbour, 580.

In criminal matters, from an early period, beginning with Lord Audley's Case, 3 Howell's State Trials, 402, 413, there was an exception to the general rule that a wife is not admissible as a witness for or against her husband, which went on the principle that where the offence charged touches the person of the wife, and she must be cognizant of it, and may be the only person who is cognizant of it, there the wife is an admissible witness against her husband. That applies to all cases where there is personal violence inflicted by the husband on the wife. In the case of an *abduction* of a woman, who afterwards becomes the wife of the person abducting, there is the carrying off, which, although no personal injury has been sustained, may well be considered as within the principle, for she must be cognizant of it, and may be the only witness who can fix the offence on the

man. *Blackburn J. in Reeve v. Wood*, 10 Cox C. C. at p. 60. "The case of the abduction of a woman has been considered as in the nature of a personal injury." *Crompton J. Ibid.* If therefore a man is indicted for the forcible abduction of a woman with intent to marry her, she is clearly a competent witness against him if the force were continuing against her till the marriage. Of this last fact also she is a competent witness; and the better opinion seems to be that she is still competent, notwithstanding her subsequent assent to the marriage and her voluntary cohabitation; for otherwise the offender would take advantage of his own wrong. *Rex v. Wakefield*, Trial published by Murray; 2 Lewin C. C. 279. 1 East P. C. 454. *Brown's Case*, 1 Ventris, 243. *Perry's Case*, cited in *Rex v. Sergeant, Ryan & Moody N. P. C.* at p. 354. *Hawkins P. C.* ch. 41, § 13. 2 Taylor Ev. § 1236.

The prosecution of the Wakefields for conspiracy and the abduction of Miss Turner, says Mr. Townsend, in the Preface to *Modern State Trials*, forms a singular chapter in legal history; interesting not less to the student of human nature, on account of its characters and incidents, than to the lawyer, for those elaborate discussions on the Scottish law of marriage and the right of the wife, even should there have been a legal marriage, to appear as a witness against the offending husband, which were argued with such profuse learning and ability. But three or four cases occur, says the same elegant writer, Vol. II. *Modern State Trials*, p. 116, at long intervals of time, in the various collections of trials, at all resembling it. In the first one, Lucy Ramsay was inveigled into a coach in Hyde Park. Browne, who had employed the persons in the park that spirited her away, afterwards prevailed upon her to marry him, on the threat that if she refused he would convey her secretly to France. 1 Ventris, 243. In the second case, one Pleasant Rawlins, an heiress, was arrested on a pretended debt, at the instigation of a German adventurer, Swendsen. He had been her suitor, without much chance of success, and hastened to her, when in custody of the sheriff's officers, to take advantage of the time and place. On his assurance that the only thing to prevent her being taken to Newgate was to marry him instantly, she consented. The marriage immediately took place, one of the Fleet parsons, those pests of society, being at hand to perform the ceremony. Notwithstanding their marriages under constraint, the two ladies were examined; and, upon their testimony chiefly both Browne and Swendsen were convicted and afterwards executed, the consent being held nugatory, as it had been induced by fear and fraud. 5 State Trials, 450. In the third case, *Rex v. Perry*, tried before Sir Vicary Gibbs, then recorder of Bristol, the lady obtained a triumphant acquittal for the supposed conspirator. She entered the witness-box fearlessly, and deposed that the defendant had used no other arts than what a lover ought, and that she had eloped with him of her own free will and with her entire consent.

The termination of the trial was equally abrupt in a fourth case, *The King*, on the prosecution of Mrs. Fanny Lee, against Lockhart and Loudon Gordon, tried at Oxford in 1804, before Mr. J. Lawrence, for a forcible abduction, but very different in some of its circumstances from the present, for there the conduct of the lady gave an appearance of connivance. Though carried with seeming violence out of her own house, she was a married lady living apart from her husband, she rode cheerily in the different post-chaises, flung a camphor bag,

which she had carried as a charm, out of the window, and, supping at Petsworth with the two gentlemen, conversed, according to her own evidence, about hieroglyphics and Grecian architecture. The judge stopped the case, as there was a total absence of proof of force in the county in which the trial took place.

In Wakefields' Case, 2 Lewin C. C. 1, 279, the defendants had, by fraudulent means, obtained possession of Miss Ellen Turner, and carried her off to Gretna Green, where, by false representations, she was persuaded to go through the ceremony of a Scotch marriage, and become the wife of Edward Gibbon Wakefield. On the trial, the counsel for the prosecution proposed to call Miss Turner as a witness. Before she was sworn, Mr. Scarlett rose to object to her evidence: Mr. Scarlett: "My lord, I propose to show that this witness is incompetent. My lord, the threat of my learned friend certainly will not deter me from doing what I conceive to be my duty in point of law, when I am called upon to do it. If he thinks it necessary for his case to examine this young lady, of course I must conceive his object in examining her is to affect the criminal party. And therefore I propose to show to your lordship she is legally married to Mr. Wakefield. I can do that by giving evidence of the marriage, and other circumstances to show it was a legal marriage; and therefore I apprehend she cannot be examined as a witness. I apprehend I have a right to do that without examining her on the *voir dire*."

Baron Hullock. "I don't know that, Mr. Attorney. Supposing the marriage should turn out to be an invalid marriage, that fact must be acquired through the medium of her evidence. But if the marriage should be considered a good marriage, that is, should be proved to be a good marriage according to the law of that country in which it was performed, then another question will arise, whether, even if she be the legal wife of this gentleman, she may not still, by the law of this country, be a competent witness."

Mr. Scarlett argued the case as if the rules of law were that a wife could in no event be admitted as a witness against her husband, save only for the purpose of proving force or some criminal charge. The wife's testimony had never been received under the statutes, except where force had been used. This principle was laid down too broadly, for in the case of *Rex v. Perry*, Bristol, 1794, cited by the judge, no force had been used, quite the contrary; and the husband was acquitted on the evidence of the wife. The Attorney General insisted that he was in a condition to prove that Miss Turner gave her full and free consent to the marriage; that a marriage did take place in Scotland, which by the law of Scotland was a valid marriage; that he had the option of proving aliunde, by collateral testimony, the incompetency of Miss Turner as a witness against Mr. Wakefield, without examining her at all. Mr. Brougham stoutly protested against his learned friend twisting in the best part of the defence under the color of giving evidence on this collateral issue; and as it was a matter of practice entirely depending on the discretion of the presiding judge, he decided on requesting Miss Turner to be called. He expressed a strong opinion that the objection would come to nothing.

Baron Hullock pronounced his opinion in favor of the admissibility of Miss Turner's evidence. "Even if the lawful wife of the defendant Gibbon Wakefield, she is a competent witness against her husband, in respect of any charge which affects her liberty or her person. She may file articles of the peace

against her husband. She may prosecute him for a misdemeanor, as was done in the case of Jagger, at York, before Mr. Justice Lawrence, which was the case of an attempt by the husband to poison his wife. It was done in the case of Lady Strathmore against Mr. Bowes and others; and in various other cases that have occurred since that time. I think it would be a strange incongruity in the law of the country, with respect to the practice of the admissibility of evidence, if it was to shut out the evidence of the only individual who was competent to speak to the facts of the case. It should seem that she is a witness *ex necessitate*, because if she was not a witness, injuries might be committed with impunity; the law of the land might in fact be violated with the greatest possible ease with impunity; the husband would be allowed to commit the grossest acts of violence without punishment if the wife was not allowed to be a witness to prove them. And therefore if the marriage be wrong she is admissible; and if it be right, I think still, in point of law, she is, under all the circumstances of this case, a competent witness."

In Ireland, on an indictment for the fraudulent abduction of an heiress, under eighteen years of age, the lady was admitted as a witness for the prosecution. *Regina v. Yore*, 1 Jebb & Symes, 563: "As to the effect upon her competency," said Bushe C. J., "produced by the marriage, it is unnecessary to discuss it at length, as the case was decided in Wakefields' Case. Baron Hullock ruled a similar objection in that case, by admitting the prosecutrix, Miss Turner, as a witness. That case came afterwards into the King's Bench (1 Deacon Crim. Law, 4) upon a motion in arrest of judgment on another point, and no question was raised as to the propriety of Baron Hullock's decision; and shortly afterwards Miss Turner was examined as a witness in support of the bill for a divorce, although that bill was opposed by Wakefield."

But in a recent case in New York it was said: "The American authorities do not countenance Wakefields' Case nor Perry's Case. The People v. Carpenter, 9 Barbour, 580. In commenting on Wakefields' Case, Barculo J. said: "But the counsel for the people contend for a much broader exception; one that will embrace all cases of secret injuries. To support this doctrine, they rely, in part at least, upon the case of *Rex v. Wakefields* (cited 2 Russell on Crimes, 606), where, on an indictment for a conspiracy in unlawfully taking Ellen Turner and procuring her to be married, Hullock B. received the evidence of the wife as being admissible on the ground of necessity, even supposing that the marriage was valid. This ruling was at the Lancaster Assizes in 1827, and can hardly be deemed an authority for introducing a new rule. That the evidence was properly received, upon the ground that the marriage itself was illegal and invalid, is highly probable; but that the *reason assigned* for its reception is a sound one, is by no means true. For if the marriage were valid, there could not be any reason of necessity for the wife to be a witness against her husband. If neither force nor fraud was used, then no such personal injury was done to her as could warrant the wife's appearing as a witness for her own protection. If *either were used*, then it was at least doubtful whether she *was a wife*, and Wakefield could not be permitted to take advantage of his own wrong by setting up his own violent or fraudulent act as the ground for excluding the principal witness, under pretence that she had thus become his lawful wife. The same remarks are applicable to the case of *Rex v. Perry*, cited by the learned judge."

In Perry's Case, Gibbs C. J. said that he could see no distinction between admitting a wife for and against her husband. "*Rex v. Perry*," said Abbott C. J. in *Rex v. Serjeant, Ryan & Moody* N. P. C. at p. 354, "was much talked about at the time, and Chief Justice Gibbs expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband, when admissible against him." Accordingly, it has been held that on an indictment against him for an assault and battery upon her, she is a competent witness for him, to disprove the charge. *The State v. Neil*, 6 Alabama, 685. *Commonwealth v. Murphy*, 4 Allen, 491.

Finally, it is to be observed that this rule of exclusion extends only to lawful marriages. Thus upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness either for or against the prisoner; for the second marriage is void. *Rex v. Serjeant, Ryan & Moody* N. P. C. at p. 354, per Abbott C. J. 2 Taylor Ev. § 1231. On a trial for forgery, Lord Kenyon refused to admit a woman as a witness for the prisoner, whom, in the course of the trial, he had frequently alluded to as his wife, but afterwards, on hearing an objection taken to her competency, denied that they were in fact married. Anonymous, cited by Richards B. in 1 Price, 83. It should be observed, that in this case the criminal had throughout the trial admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned. And in a subsequent case, *Batthews v. Galindo*, 4 Bingham, 610; 1 Moore & Payne, 565; 3 Carrington & Payne, 238, where Lord Kenyon's ruling was discussed, Park and Burroughs JJ. declared that his lordship's decision was founded on this admission, and the whole court determined that a kept mistress is a competent witness for her protector, though she passed by his name and appeared to the world as his wife. And see acc. *Regina v. Young*, 2 Cox C. C. 291. So where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation. *Wells v. Fletcher*, 5 Carrington & Payne, 12; s. c. nom. *Wells v. Fisher*, 1 Moody & Robinson, 99, and note. And it seems that a supposed husband or wife may, both in civil and criminal cases, be examined on the voir dire to facts showing the invalidity of the marriage; and it is apprehended no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony. 2 Taylor Ev. § 1231. *Regina v. Young*, 5 Cox C. C. 296. "It may well be doubted," observed Lord Tenterden C. J., "whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called." *Rex v. Bathwick*, 2 Barnewall & Adolphus, at p. 646; ante p. 275. See *Regina v. Peat*, 2 Lewin C. C. 288; *Wakefields' Case*, ubi supra; *Rex v. Bramley*, 6 Term R. 330.



MOORE v. THE COMMONWEALTH.<sup>1</sup>

March Term 1843.

*Adultery — Indictment.*

An indictment which alleges that P. M., on a certain day and at a certain place, "did commit the crime of adultery with one M. S., by then and there having carnal knowledge of the body of said S., she the said S. then and there being a married woman, and having a husband alive," is not sufficient to support a conviction. These allegations do not show, with certainty, that M. S. was not the wife of P. M.

WRIT of error to reverse a judgment of the Court of Common Pleas in the county of Middlesex, at the February term 1843, sentencing the plaintiff in error to solitary imprisonment and confinement at hard labor, in the house of correction.

The indictment, on which the conviction and sentence were founded, was thus: That the said Moore, "on the 24th of July 1842, at Lowell in the county of Middlesex, did commit the crime of adultery with one Mary Stuart, by then and there having carnal knowledge of the body of said Stuart, she the said Stuart then and there being a married woman, and having a husband alive; against the peace," &c.

It was assigned for error (among other causes) "that it does not appear but that said Peter Moore and Mary Stuart were married together."

*B. F. Butler*, for the plaintiff in error. The averment, in the indictment, that the prisoner, on a certain day, "did commit the crime of adultery," would be clearly insufficient to warrant a judgment, or even to put him on his defence. It was therefore necessary to insert such other averments as would show that an act of adultery had been committed by him. But for aught that is averred, Mary Stuart may have been his wife. The name given to her is of no importance. Archbold Crim. Pl. (3d Amer. ed.) 27. If she and the prisoner had been privately married, the grand jury would of course give her the name by which she was usually known.

*S. D. Parker*, for the Commonwealth. This indictment is according to the form set forth in Davis's Precedents, 48, and which

<sup>1</sup> 6 Metcalf, 243.

it is believed has generally been used in this commonwealth. By giving the woman a name different from that of the prisoner, the grand jury, by necessary implication, have negatived the fact that she was his wife.

SHAW C. J. The indictment is for adultery, charging that said Peter Moore, on &c. at &c. did commit the crime of adultery with one Mary Stuart, by then and there, &c. she the said Mary Stuart then and there being a married woman, and having a husband alive; against the peace, &c.

The error assigned is, that it does not appear but that said Peter Moore and Mary Stuart were married together. The argument urged in behalf of the defendant is, that the indictment charges no crime with sufficient certainty; that all the facts alleged may be true, and yet no crime committed; because, for aught that appears in the indictment, the said parties were man and wife.

We suppose it is pretty clear to common apprehension what the grand jury meant by this averment; but the difficulty is, that the precision and certainty required in criminal pleading, for the security of the accused, will not admit any thing to be taken by intendment. An averment that one had committed the crime of adultery, without alleging how and in what manner, would be clearly insufficient. The purpose of an indictment is, to allege and set forth those facts which constitute that crime; and for that purpose it must appear that the woman, with whom the illicit connection is alleged to have taken place, was not the wife of the accused. This is commonly done by alleging that at the time she was the wife of a person named, then living; but perhaps that is not necessary. Any form of words stating that she was the wife of some person other than the accused would be sufficient.

It was argued in support of the prosecution, that giving the woman a different name from that of the accused carried a necessary implication that she was not his wife; because, had she been his wife, she would have borne his name. Although this practice is general, yet it is not so universal, that giving a woman a surname different from that of a man, raises a necessary implication that she is not his wife. Besides; it is not certain that the jury intended to state the entire christian and surname of the woman; they may have intended to use her christian name only, she having

a middle name, or the name by which she was commonly known, and could be identified. The court are of opinion that it is not averred with sufficient certainty that the alleged illicit intercourse took place with a married woman, not the wife of the accused; and that, for this cause, the judgment is erroneous.

*Judgment reversed.*

In *Commonwealth v. Reardon*, 6 Cushing, 78, the indictment alleged that the defendant, on the 15th July 1850, "did commit the crime of adultery with one Catharine Ann Smith, then the lawful wife of Peter J. Smith, by then and there having carnal knowledge of the body of the said Catharine Ann Smith." The defendant moved in arrest of judgment for the following reasons: 1st. That it did not sufficiently appear in the indictment that Catharine Ann Smith, with whom the offence was alleged to have been committed, was not the lawful wife of the defendant; 2d. That the defendant was not alleged in the indictment to be a lawfully married man; 3d. That the defendant was not alleged therein to be unmarried.

DEWEY J. "In the opinion of the court, it does sufficiently appear in this indictment, that Catharine Ann Smith, the person with whom the adulterous intercourse is charged, was not the lawful wife of the defendant. It is in direct terms alleged that she was "the lawful wife of Peter J. Smith." This allegation is, to all intents and purposes, substantially an allegation, that Catharine Ann Smith was not the wife of the defendant. Being at the time of the alleged offence the legal wife of Peter J. Smith, she could not be the wife of the defendant; as Catharine Ann Smith could be the wife of but one man. The government assume the burden of proving that she was the wife of Peter J. Smith, and if they fail to sustain this allegation the evidence will not sustain the indictment. If they do establish the fact, then they show that Catharine Ann Smith was not the wife of the defendant. The case of *Moore v. The Commonwealth*, 6 Metcalf, 243, does not conflict with this view of the case. In that case, there was no allegation that the female was the wife of another person, and the only allegation, from which such inference could be supposed to be authorized, was that setting forth the name of the female, and giving her a different name from that borne by the party indicted for the adultery.

"The second objection urged is, that it is not alleged in the indictment that the defendant 'was an unmarried man.' The position taken is, that the statute has made such allegation necessary from the peculiar provisions of the Revised Statutes, ch. 130, § 1, that the crime of adultery may be committed by an unmarried man by his having sexual intercourse with a married woman. The counsel for the defendant assumes that the indictment is founded wholly upon that particular part of the statute. The error of the counsel for the defendant is in supposing, that because the female, with whom the sexual intercourse is alleged to have been committed, is alleged to have been a married woman, it necessarily imports that the offence charged is one described in the latter clause of the first section of this chapter. It is true, that if the party indicted is himself alleged to be a married man, the indictment will be good and sufficient in form, without any allegation that the person with whom he had sexual inter-

course was a married woman; but it is no less true that the indictment in such case may equally allege both the parties to the adultery to be married persons. And it is no less adultery because both the parties are married persons. It is essential to this offence, that one of the parties should be a married person, and this must be distinctly alleged. The charge against the defendant is, that he has had sexual intercourse with the wife of Peter J. Smith. This fact being proved, the defendant is shown to have committed the crime of adultery, and equally so whether he is a married man or single, it being immaterial what his condition is in this respect, if the other party is a married person. All that is necessary to constitute the crime of adultery under our statutes is fully alleged in this indictment. The motion in arrest of judgment must therefore be overruled."

In *Helfrich v. The Commonwealth*, 33 Pennsylvania State, 68, the indictment alleged that the plaintiff in error, "then and there being a married man and having a wife in full life, to wit, Mary Ann Helfrich, did commit adultery with a certain Matilda Moyer." Lowrie C. J. in delivering the opinion said: "It is not charged that Matilda Moyer was not his wife; but his wife is named by a different name as still alive, and no one can reasonably suppose that the wife and Matilda Moyer are not different persons."

In a recent case in Maine, *The State v. Thurstin*, 35 Maine, 205, the indictment charged that the defendant, at Avon, "on the 25th day of March 1851, did commit the crime of adultery with one Emeline Whitehouse, the wife of one Solomon H. Whitehouse, she, the said Emeline Whitehouse, being a married woman, and the lawful wife of him, the said Solomon Whitehouse." Howard J. in delivering the opinion of the court, said: "In this case, the fact of committing the crime of adultery, at a certain time and place, with Emeline Whitehouse, is first alleged against the accused; but to the fact that she was a married woman, and the wife of another, no time is averred, nor is there a reference, to the certain time before stated, by the words *then and there*, or any equivalent terms. Although we can readily suppose what was intended by the averments, yet, in criminal pleading, nothing can be taken by intendment. The allegation "being a married woman, and the lawful wife of Solomon H. Whitehouse," has reference to the time of finding the indictment, and not to the time of the offence, in strictness of criminal law. *Bridge's Case*, Cro. Jac. 639. 2 Lord Raymond, 1467. 2 Chitty Crim. Law, 181. The indictment is therefore insufficient." See *The State v. Hutchinson*, 36 Maine, 261.

An allegation that the offence was committed "with a certain woman whose name to said jurors is unknown, &c., the defendant "being then and there a married man, and then and there having a lawful wife alive, other than said woman whose name to said jurors is unknown as aforesaid," is a sufficient description of the person with whom the offence is alleged to have been committed. *Commonwealth v. Tompson*, 2 Cushing, 551. Shaw C. J.: "The motion in arrest of judgment is founded on the objection, that there is no sufficient description, in the second count, of the person with whom the offence was committed, and that it is not sufficient to charge that it was with a person whose name was unknown. We can perceive no ground for this objection. If the person was known, but the name unknown, we see not how it could be otherwise charged with truth. But further, the indictment states her to be a person whose name is unknown, but a person other than the defendant's wife. When goods are alleged to be the property of persons unknown, and the averment and proof

of that act may affect the rights of the Crown, or of third persons, it may be more material, as in *Rex v. Robinson*, Holt N. P. C. 595; but there it was a question of proof and not of pleading. As adultery may be committed by a married man with a single woman (*Commonwealth v. Call*, 21 Pickering, 509; Rev. Sts. ch. 130, § 1) it is not necessary to state the name of the woman with any view to showing that she was a married woman. It is then quite obvious that the crime may be committed, and can be testified to by persons who know, and have the means of knowing, that the woman is not the wife of the accused. The witnesses may be the neighbors of the accused, who know him well, and who know the wife well, and the criminal act may be committed under such circumstances that they may see and know the countenance of the woman, and can testify that she was not the wife of the accused. This may occur at a tavern or other place where the parties casually meet, and from whence they immediately separate, so that the witnesses cannot learn the name of the woman. It seems that an indictment in such case alleging the facts which constitute the offence, with as much certainty as the case admits of, is sufficient."

Parties to the crime of adultery may be jointly indicted. *Commonwealth v. Elwell*, 2 Metcalf, 190. In Alabama it has been held, that the marriage of either party need not be alleged, because the word adultery implies, per se, that one of the parties is a married person. *The State v. Hinton*, 6 Alabama, 864. The allegation, "did commit adultery" does not merely imply, but expresses carnal knowledge. *Helfrich v. The Commonwealth*, 33 Pennsylvania State, 68.

The same reasons on which it was adjudged in *Moore v. The Commonwealth*, that an indictment for adultery is bad which does not allege that the persons who committed the offence were not married to each other, apply to the offence of fornication. *Commonwealth v. Murphy*, 2 Allen, 163. In this case the indictment was in the common form of an indictment for rape, and did not allege that the person upon whom the offence was alleged to have been committed was not the lawful wife of the defendant. This verdict was returned: "Guilty of having carnal knowledge of the body of H. S., in manner and form as charged in the indictment, but not feloniously, nor by force, nor against her will." Held, that a conviction for fornication could not be sustained. A similar verdict was returned in *Commonwealth v. Squires*, 97 Massachusetts, 59, which was also an indictment for rape, "upon one C. D. an unmarried female," with the additional averments that the defendant was "then and there a married man, and then and there had a lawful wife alive other than the said C. D." It was held that the defendant could be sentenced for adultery under Gen. Sts. ch. 172, § 16.

In *Murray v. The Queen*, 9 Jurist, 596; 7 Queen's Bench, 700 (1845), which was an indictment for bigamy, the indictment charged that C. D. on &c. at &c. "took to wife one Alicia Marshall, and to the said Alicia Marshall then and there was married. And that the said C. D. afterwards, to wit, &c. at &c. feloniously took to wife one Catherine Clarke, spinster, and to the said Catherine Clarke, on &c. at &c. was married, *the said Alicia, his former wife, being then alive*; against the form of the statute, &c. It was held that the offence was sufficiently charged, without also alleging that the prisoner was still married to Alicia Marshall when he married Catherine Clarke; for a divorce from Alicia Marshall was not to be presumed.<sup>1</sup>

<sup>1</sup> In *Regina v. Apley*, 1 Cox C. C. 71, this point was doubted by Alderson B.

LORD DENMAN C. J. : " There is no doubt in this case. I at first thought that the form of indictment before us had been the constant one ; it seems however that in some indictments the conclusion of law, that the parties formerly married have continued so, is expressly stated. But, if that results from all the facts of the case, it is enough to state these. If it is reasonable that the indictment should negative any dissolution of the marriage, it may as well be required that the prosecutor should deny that the statute was repealed."

PATTESON J. : " The statute does not require that the words ' being married ' should be inserted in the indictment ; those words, in the statute, mean married at the time of the passing of the act. All that is necessary to show is, that the party is married to another person, the former wife being alive. And when the relation of marriage is pointedly referred to in the description of the person, we must presume that the woman being alive, the marriage with her still subsists ; we are not to presume a divorce."

WILLIAMS J. : " The first objection amounts to this, that the indictment must negative all the circumstances stated in the proviso of the statute, under which a second marriage would be legal during the life of her who was the first wife. The term ' wife ' is perfectly well understood. A woman would not bear the title of wife properly if the marriage had been annulled. To suppose, when the word ' wife ' is used, that a divorce may have taken place, is contradictory to the term itself."

COLERIDGE J. : " It cannot be said that this indictment does not follow the words of the statute. It is true, as was held in *Fletcher v. Calthrop*, 6 Queen's Bench, 880,<sup>1</sup> that where the statute, if pursued literally, does not show an offence, the indictment or conviction must supply the necessary averment ; as, in the case of fishing in a water, a conviction must show that the act was done without the owner's consent, though the statute proceeded upon does not notice that circumstance. *Rex v. Corden*, 4 Burrow, 2279. But this statute does in terms describe an offence ; the terms ' husband ' and ' wife ' have a distinct and ascertained meaning affixed to them. If the statute had used the word ' person ' without reference to the status personæ, it might be no offence to charge A. with marrying B. during the life of that person. But here the allegation is not merely ' the said Alicia being alive,' but ' the said Alicia, his former wife, being alive.'"

In *Commonwealth v. Corson*, 2 Parsons, 475, Parsons J. said : " *Moore v. The Commonwealth* rules the present case, nor can there be a distinction drawn between them."

<sup>1</sup> In *Cureton v. The Queen*, 1 Best & Smith, at p. 216, Hill J. said : " I cannot understand *Fletcher v. Calthrop* ; and with the greatest possible respect for the Judges by whom it was decided, I think that if the point in that case ever arises again it will deserve attention." Cockburn C. J. : " I quite agree with my brother Hill."

COMMONWEALTH v. ELWELL.<sup>1</sup>

November Term 1840.

*Indictment — Averment of Knowledge.*

It is not necessary, in an indictment against an unmarried man for adultery with a married woman, under Rev. Sts. ch. 130, § 1, to aver that he knew, at the time when the offence was committed, that she was a married woman. Nor is it necessary to prove such knowledge on the trial.

Parties to the crime of adultery may be jointly indicted.

THE indictment in this case was against the defendant, Elwell, and Elizabeth R. Fosburg, and alleged that they, on &c. at &c. "did commit the crime of adultery with each other," &c. "she the said Elizabeth, being then and there a married woman, and having a lawful husband alive." After a conviction in the Court of Common Pleas, the defendants alleged exceptions to the ruling of Williams C. J. "1. Because he instructed the jury that said Elwell might be found guilty of the crime of adultery, although it was not alleged nor proved that he was married or knew that the woman, with whom the offence was alleged to have been committed was a married woman at the time the offence was committed.. 2. Because the judge ruled that the man and woman committing that offence might be jointly indicted in one indictment, as in this case, and that this indictment is good upon its face."

*Ward*, for the defendants.

*Austin*, Attorney-General, for the Commonwealth.

SHAW C. J. The two defendants having been jointly indicted for the crime of adultery, and found guilty, several exceptions were taken to the opinions of the judge of the Court of Common Pleas, before whom the cause was tried, which have been brought before this court for their consideration and decision. The first I shall consider is an objection to the form of the indictment, because the two defendants are indicted jointly for the offence committed with each other.

It is not easy to find precedents on this subject, because in England adultery is not considered as a secular offence punishable by indictment, but an offence against good morals, punishable by

<sup>1</sup> 2 Metcalf, 190.

ecclesiastical censures in the spiritual courts. Perhaps precedents might be found in other States of the Union ; but none have been brought to our notice.

The general rule is, as laid down in 1 Starkie Crim. Pl. ch. 2, and other works of good authority, that where the same evidence, as to the act which constitutes the crime, applies to two or more, they may be jointly indicted. See Hammond on Parties, 252 ; 2 Hawkins P. C. ch. 25, § 89. Nor is it an objection, that the fact, proved against two or more, constitutes a distinct species of legal and technical offence. As where a wife, acting with a third person, maliciously takes the life of her husband. It is murder in the one, and petit treason in the other ; yet they may be indicted together. So where the same evidence proves one guilty as principal, and another as accessory before the fact, in felony they may be jointly indicted. 1 Starkie Crim. Pl. 34, 35.

Upon this view of the case, the court are of opinion that the indictment is in this respect sufficient.

2. The second exception is, that the judge instructed the jury that said Elwell might be convicted, although it was not alleged nor proved that he was married, or knew that the woman, with whom the offence was alleged to be committed, was a married woman, at the time the offence was committed.

The first part of this objection is answered by the express provision of the Rev. Sts. ch. 130, § 1, that when the crime is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery. This part of the exception was not relied upon in the argument.

The other part of the exception requires more consideration. 1st. In the first place, this is not one of the cases where the statute makes it necessary to allege that the act was knowingly done, as a constituent part of the crime. In the case of passing counterfeit money, cited in the argument, the act of passing a coin or bill is, in itself, wholly free from guilt. The whole offence consists in doing an indifferent act with guilty knowledge. Such guilty knowledge is made by the statute a constituent part of the offence, and therefore it must be averred and proved as such. 2d. But it is in general true, and may be considered as a rule almost necessary to the restraint and punishment of crimes, that when a man does that which, by the common law or by statute, is unlawful, and in pursuing his criminal purpose, does that which constitutes



another and different offence, he shall be held responsible for all the legal consequences of such criminal act. When a man, without justifiable cause, intends to wound or maim another, and in doing it kills him, it is murder, though he had no intention to take life. The statute makes it punishable carnally to know and abuse a female child under the age of ten years. Would it be necessary to allege and prove affirmatively, that the accused knew she was under the age of ten years? A fact extremely difficult, and in most cases impossible to prove. No; a more reasonable and practicable rule is, that if a man shall wilfully do an unlawful and criminal act, he must take upon himself all the legal and penal consequences of such act.<sup>1</sup> 3d. It is true, indeed, that in the commission of all crimes, a guilty purpose, a criminal will and motive are implied. But in general, such bad motive or criminal will and purpose, that disposition of mind and heart, which is designated by the generic and significant term "malice," is implied from the criminal act itself. But if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is matter of defence, to be averred and proved on his part, if it does not arise out of the circumstances of the case, adduced on the part of the prosecution.

The court are therefore of opinion that it was not necessary to aver in the indictment, that the defendant Elwell knew that the woman, with whom the act was committed, was a married woman; it was sufficient to allege, as the indictment does, that she was a married woman, when the offence was committed.

The exceptions are overruled, and judgment is to be rendered, and sentence passed on both the defendants.

Wherever a statute makes a guilty knowledge part of the definition of an offence, the knowledge is a material fact which must be expressly averred. *Commonwealth v. Flannelly*, 15 Gray, 195. But where a statute prohibits generally,

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<sup>1</sup> The 24 & 25 Vict. ch. 100, § 55, enacts that "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." In *Regina v. Olifier*, 10 Cox C. C. 402, Bramwell B. was of opinion that any one dealing with an unmarried girl does so at his peril, and if she turn out to be under sixteen is liable under this statute.

and is silent as to intention, it appears clear that a pleader need not aver knowledge upon the face of the indictment. 1 Starkie Crim. Pl. 166. 2d ed. "A scienter is never necessary to be alleged, except when the crime is not complete, without some extrinsic circumstance within the prisoner's knowledge, as in cases of inciting a prisoner to escape, uttering a forged note or bill, and cases of that description, where, without the scienter, the act is free from guilt." *The State v. Brown*, 2 Speers, at p. 135. This rule is well stated in *Commonwealth v. Stout*, 7 B. Monroe, at p. 249: "Where the statement of the act itself includes a knowledge of the act, no averment of knowledge or bad intent is necessary. But where such is not the case, knowledge must be alleged and proved."

This principle was thus stated by Hoar J. in his usual clear and forcible manner: "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises, unless he knew that he could do so lawfully, if he violates the law he incurs the penalty. The salutary rule, that every man is conclusively presumed to know the law, is sometimes productive of hardship in particular cases. And the hardship is no greater, where the law imposes the duty to ascertain a fact. It could hardly be doubted that it would constitute no defence to an indictment for obstructing a highway, if the defendant could show that he mistook the boundaries of the way, and honestly supposed that he was placing the obstruction upon his own land. The same principle was applied in the case of bigamy, *Commonwealth v. Mash*, 7 Metcalf, 472;<sup>1</sup> and in the case of adultery, *Commonwealth v. Elwell*, 2 Metcalf, 190." *Commonwealth v. Boynton*, 2 Allen, 160. In this case it was held that a person may be convicted of selling intoxicating liquor, although it is not proved that he knew the liquor was intoxicating. See also *Commonwealth v. Goodman*, 97 Massachusetts, 117.

The first part of the rule is well illustrated by the case of *Rex v. Jukes*, 8 Term R. 537. The St. Geo. III. ch. 60, § 2, enacts that no person shall expose metal buttons marked with the word "gilt," which were not gilt, contrary to the form of the statute. But the court, notwithstanding they had a strong desire to support the conviction, decided that it should have been alleged, that the defendants *knew the same not to be gilt with gold*; for which reason the conviction was not supported.

In *Commonwealth v. Caldwell*, 14 Massachusetts, 330, in an indictment on St. 1791, ch. 58, § 10, imposing a penalty for refusing to answer a tithing-man, it is not necessary to aver that the defendant knew him to be a tithing-man. "This is not necessary," said Parker C. J., "he being a public officer. The indictment in this particular follows the statute. The scienter is not a constituent part of the offence, as in possessing counterfeit bank-notes. If the defendant did not know him to be an officer, this would be good defence by the common law, and need not be negatived in the indictment." The Revised Statutes of Massachusetts, ch. 131, § 1, enacts: "If any person shall knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, he shall be punished," &c. An indictment is vicious in which there is an omission to aver a knowledge by the defendant, at the time of the alleged sale that the provisions were cor-

<sup>1</sup> See *Commonwealth v. Thompson*, 6 Allen, 591, and 11 Allen, 23; *Regina v. Turner*, 9 Cox C. C. 145.

rupt. Bigelow J.: "The only distinct averment of knowledge on the part of the defendant is, that he 'knowingly sold' corrupt and unwholesome meat. There is no averment that he knew the meat to be in a diseased and unhealthy state, or unfit for food at the time of the sale. The word 'knowingly' does not apply to and qualify every act charged, essential to constitute the offence under the statute; strictly speaking and construing the language of the indictment according to the technical rules of pleading, it qualifies and gives significance only to the word sell; so that in substance and legal effect, the averment is only that the act of sale was done by the defendant knowingly. But there is no allegation of any knowledge by him, at the time the sale was made, of the condition of the meat. The whole allegation might therefore be true, and yet the defendant might be innocent of any offence. The sale, of itself, is not made criminal, but it is the sale coupled with a knowledge of the diseased state of the thing sold, which constitutes the offence; a person might well sell meat knowingly, and yet be wholly ignorant of its true condition. The averment of knowledge does not extend to each part of the description of the offence, in which it is an essential element. The indictment is therefore fatally defective. The precedents of indictments for offences similar to that intended to be set out in the present indictment, are quite numerous, and are uniform in alleging, not only that the act of sale was made knowingly, but also in averring that the defendant well knew at the time of the sale the corrupt and unwholesome condition of the articles sold. See 2 Starkie Crim. Pl. 682; 2 Chitty Crim. Law, 556, 558." *Commonwealth v. Boynton*, 12 Cushing, 499. See Also *Hemmenway v. Woods*, 1 Pickering, 524. In *Commonwealth v. Farren*, 9 Allen, 489, the indictment was founded on St. 1864, ch. 122, § 4, which enacts that "Whoever sells or keeps, or offers for sale, adulterated milk, or milk to which water or any foreign substance has been added," shall be punished, &c. It was held that an averment that the defendant sold the milk knowing it to be adulterated may be rejected as surplusage. The offence is complete by making the sale. See also *Commonwealth v. Nichols*, 10 Allen, 199; *Commonwealth v. Waite*, 11 Allen, 264. The General Statutes of Massachusetts, ch. 88, § 71, enacts that "The keeper of a billiard-room or table, or bowling-alley, who admits a minor thereto without the written consent of his parent or guardian," shall forfeit, &c. In a complaint it is not necessary to aver that the defendant knew that the alleged minors were under age. Bigelow J.. "The prohibition of the statute is absolute. The defendant admitted them to the room at his peril, and is liable to the penalty, whether he knew them to be minors or not. The offence is of that class where knowledge or guilty intent is not an essential ingredient in its commission and need not be proved." *Commonwealth v. Emmons*, 98 Massachusetts, 6. An indictment for obtaining goods by false pretences, may well be sustained which follows the words of the statute, without averring in addition that the defendant "knowingly" made the false pretences. *Commonwealth v. Hulbert*, 12 Metcalf, 446. See *Regina v. Henderson*, 13 Queen's Bench, 790. See ante note to *Commonwealth v. Bean*.

In *Commonwealth v. Raymond*, 98 Massachusetts, 567, the defendant was indicted under the first clause of St. 1866, ch. 253, by which it is made punishable to kill a calf less than four weeks old for the purpose of sale. Foster J.. "It was not necessary to allege in the indictment that he knew the calf to be less than

four weeks old. Under this clause, as under the laws against the sale of intoxicating liquor or adulterated milk, and many other police, health, and revenue regulations, the defendant is bound to know the facts and obey the law at his peril. Such is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed."<sup>1</sup> But it is submitted that this distinction is not sustainable. Blackstone's distinction between mala in se and mala prohibita is well known. The former class consists of those actions which would be violations of the moral law, even if there were no positive enactment to forbid them. The latter consists of those actions which owe their criminality to prohibitory enactments, and would in the absence of such prohibitory enactments be innocent. With regard to this latter class of actions, Blackstone is of opinion, that "conscience is no further concerned than by directing a submission to the penalty in case of our breach of those laws." In Stephen's Commentaries, I. 40, 6th ed., it is said: "The distinction will perhaps hardly bear the test of a close inquiry. To form a true judgment on the subject, it is necessary to take into consideration that the true principle both of moral and positive laws is in effect the same; viz., utility, or the general welfare, and that disobedience to either sort of precept must be presumed to involve in it some kind of mischievous consequence. Supposing the existence of a law of the merely positive class, which happens to be considered by the public at large as useless or even detrimental to society, yet a conscientious man will feel himself bound to observe it, for no other reason, yet for this, that his taking the contrary course might encourage others to violate laws of a more beneficial character, and lessen the general reverence for the institutions of his country." Hence it follows that breaches of the law as such, are mala in se; and therefore the particular actions which constitute breaches of the law are mala in se, although the inaptitude of the actions in question is owing exclusively to the prohibitory injunctions of positive law." The London Law Magazine, vol. 26, pp. 349, 350.

In Massachusetts, the law on this subject has been recently considered in the case of *Commonwealth v. McGarrigill* (not elsewhere reported), in the Municipal Court of the city of Boston, November term 1855. The Rev. Sts. ch. 130, § 10, enacts: "If any person shall import, print, publish, sell, or distribute any book, or any pamphlet, ballad, printed paper, or other thing, containing obscene language, or obscene prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school, or place of education, or shall buy, procure, receive, or have in his possession, any such book, pamphlet, ballad, printed paper, or other thing, either for the purpose of sale, exhibition, loan, or circulation, or with intent to introduce the same into any family, school, or place of education, he shall be punished," &c.

The indictment, which contained one count, charged that the defendant "did have in his possession, for the purpose of the sale of the same, a certain book then and there containing obscene language, obscene prints, obscene pictures, obscene figures, and obscene descriptions, manifestly tending to the corruption of the morals of youth, which said book was then and there entitled," &c. setting forth

<sup>1</sup> It is to be observed that in this case there was a sufficient averment of knowledge.

the title of the book, but omitting a statement of its contents, and alleging a reason for the omission by the usual averments. To this indictment the defendant filed a general demurrer.

ABBOTT J. This is an indictment under the Rev. Sts. ch. 130, § 10, for selling a book containing obscene language, &c. The prisoner demurred to the indictment upon the ground, that it was nowhere alleged that he knew that the book contained obscene language. On examination, it appears that there is no allegation in the indictment that the prisoner sold the book described, knowing its contents, or with an intent to corrupt public morals, and that it contains no equivalent allegations which might be taken necessarily to amount to knowledge on his part. If it had been alleged that the book was sold with a design and intent to corrupt public morals, then it might be well held that the design and intent necessarily included knowledge, and was equivalent to an express allegation to that effect, because no one can be held to intend and design to use certain means to attain certain ends without a knowledge of the means used. This would be in accordance with the adjudged cases. *Commonwealth v. Hulbert*, 12 Metcalf, 446. But this indictment contains no such equivalent allegations; none which can in any way amount to a charge of knowledge on the part of the prisoner.

The first question that arises upon this state of the pleadings is, whether knowledge is a necessary ingredient in the offence, because if the crime is complete without it, by the mere act of selling books which are in fact obscene, although such fact may not be known to the seller, then, the allegation in the indictment is sufficient. The argument pressed is, that it was intended, on grounds of public policy, to make the selling of such books, whether their contents are known or not, punishable, and that any one who undertakes to sell books must see to it, that he knows what he is selling, and that this is analogous to a class of cases under the revenue laws, where persons may be liable to forfeitures for the doing of acts in which they do not participate, and have no knowledge. But upon a careful examination of the whole subject, I think it is apparent that such is not the construction that should obtain here. Generally, intent, knowledge, is of the very essence of crime, and there must be very strong reasons shown to exist to take any case out of the application of this general rule. There certainly appear to be no such considerations applicable to the case at bar; and to hold that this offence may be committed by a blind man who sells books for a livelihood, and who happens, innocently, to sell an obscene publication, would be giving a construction to the statute, manifestly harsh, and not required by the rules of law. Many other cases might be put where it is apparent, that the construction claimed would be equally harsh and unjust.

Taking it then as settled, that knowledge is necessary to constitute the offence, is the indictment sufficient? There is no more general, useful, logical, safe, and well-settled rule applicable to criminal pleading than this, that an indictment should state every fact and circumstance necessary to constitute the offence intended to be described. 1 Chitty Crim. Law, 228. *Commonwealth v. Strain*, 10 Metcalf, 521. 2 Gabbett Crim. Law, 227. Archbold Crim. Pl. 41. That such is the general rule will not now be denied; but it is claimed that an exception exists in case of certain acts the doing of which is forbidden by statute, and that in such cases, it is sufficient to allege simply the doing of the acts complained of; and certainly there are expressions in some of the elementary writers of

authority, which sustain such a position. I apprehend however that if any regard is paid to the logic of, or the general rules governing in criminal pleadings, that this exception must be held to apply only to those cases where the doing of the act made an offence, necessarily implies, and includes a knowledge of its criminal character, and also the criminal intent. With this qualification, the position is undoubtedly correct; but it is certainly against both authority and reason to extend it to those cases where the mere act itself is not sufficient unless the criminal knowledge and intent exist. Nor can the argument prevail, that in this case want of knowledge is a matter of defence, to be shown by the prisoner. When criminal knowledge is necessary to constitute an offence, the burden of showing it is always on the government. Undoubtedly, in general, proof that a person sold obscene books would be sufficient *prima facie* evidence of knowledge, and the defendant would be required to overcome it; but still the duty would be on the government to prove the scienter, the mere production of *prima facie* evidence not changing the burden of proof. Upon the whole, testing this case by the well-settled rules of criminal law, and the reason and the logic of those rules, I am satisfied that knowledge is necessary to constitute the offence in question, and that it being so, it is essential that the indictment should either contain an express allegation of such knowledge or something equivalent to it.

In *Commonwealth v. Earle*, 1 Wharton, 525, it was decided that in an indictment for murder, at common law, by poison, it is not necessary to allege that the prisoner knew the substance administered to be a deadly poison. By the Court: "In *Mary Blandy's Case*, 10 Hargrave's State Trials, 1,<sup>1</sup> the prisoner was executed, though the indictment contained no such averment. Yet it is undoubtedly the safer course to insert it, *ex majori cautela*." In *Commonwealth v. Galavan*, 9 Allen, 271, the indictment was founded on the Gen. Sts. ch. 160, § 32, which provides for the punishment of "whoever mingles any poison with food, drink, or medicine, with intent to kill or injure another person." It was determined that the indictment need not contain an averment that the mixture was or known to be poisonous. Gray J.: "The statute does not require that the mixture should be or known to be poisonous, and the indictment need not therefore allege that it was."

The word "knowingly," or "well knowing" will supply the place of a positive averment that the defendant knew the facts subsequently stated. *Rex v. Lawley*, 2 Strange, 904; *Fitzgibbon*, 122, 263. Com. Dig. Indictment, G. 6. *Rex v. Rushworth*, Russell & Ryan C. C. 317; 1 Starkie N. P. C. 396. *Purcell* Crim. Pl. 87. And as to what is a sufficient averment of knowledge, see *Commonwealth v. Kirby*, 2 Cushing, 577; *The State v. Carpenter*, 20 Vermont, 9; *Commonwealth v. Raymond*, 97 Massachusetts, 567. When the terms "knowingly" or "the defendant well knowing," are introduced into an indictment, although alleged as an ingredient in the imputed crime, if introduced where the knowledge alleged is unnecessary to be shown in proof, in order to constitute the crime, these allegations may always be rejected as surplusage. *Purcell* Crim. Pl. 87. *Williamson v. Allison*, 2 East, at p. 452. *Dewey J.* in *Commonwealth v. Squire*, 1 Metcalf, at p. 261. *Regina v. Gurney*, 10 Cox C. C. 550.

<sup>1</sup> 18 Howell's State Trials, 1117.

REGINA v. LEWIS.<sup>1</sup>

May 2, 1857.

*Manslaughter — Death in England from Injuries inflicted on the High Seas — Foreigners — Jurisdiction.*

The prisoner was convicted of manslaughter. The prisoner and the deceased were foreigners, and the latter died at Liverpool from injuries inflicted by the prisoner on board a foreign ship on the high seas. *Held*, that the offence was not cognizable by the law of England, and that the conviction was wrong.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Martin B.

The prisoner was indicted at the last Liverpool Assizes for manslaughter, and found guilty. He was a Frenchman by birth, and a naturalized citizen of the United States of America, and not a subject of the Queen. On the 21st December 1856 he shipped on board the American ship *Guy Mannering*, at New York, and signed articles to serve as an able seaman therein on a voyage from thence to Liverpool. The deceased, George, also shipped on board the same vessel at New York, and signed articles to serve as a seaman therein for the same voyage. He was a German by birth, and not a subject of the Queen. The *Guy Mannering* was American owned, commanded by an American master, and sailed under the flag of the United States. Soon after the commencement of the voyage the convict and others exercised much cruelty towards the deceased. The last act of cruelty proved was committed four days before the *Guy Mannering* arrived at Liverpool, and when she was upon the high seas, west of Cape Clear in Ireland. The *Guy Mannering* arrived in the Mersey in the morning of the 12th January 1857, and the deceased died in an hospital at Liverpool in the afternoon of the same day, in consequence of the cruelty and violence committed upon him by the prisoner and others during the voyage. The question upon which I request the opinion of the Court of Criminal Appeal is whether the convict was subject to be tried and convicted at the assizes for Liverpool. The statute 9 Geo. IV. ch. 34, § 8, was relied upon on behalf of the prosecution.

SAMUEL MARTIN,  
April 5th, 1857.

<sup>1</sup> Dearsly & Bell C. C. 182.

This case was argued on 25th April 1857 before COCKBURN C. J., COLERIDGE J., MARTIN B., CROMPTON J. and WILLES J.

*Aspinall* appeared for the Crown; no counsel appeared for the prisoner.

*Aspinall*, for the Crown. The question is whether, under the circumstances of this case, an offence was committed cognizable by our laws? The deceased and the prisoner were both foreigners serving on board a foreign vessel. The blow which caused the death was struck upon the high seas, and the deceased died in this country. In *Regina v. Conolly*, tried at the Liverpool Spring Assizes 1856, the prisoner, who was convicted, was a British subject; but in all other respects the facts were similar to those in the present case. It may be admitted that the court had no jurisdiction unless the prisoner is triable under sect. 8 of the 9 Geo. IV. ch. 31, which enacts, "that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place." It would appear that the legislature intended by this enactment to make a foreigner liable to our law in cases of this kind. In 1 East P. C. 365, it is said: "It seems to have been a matter of great doubt whether the killing of one, who died at land of a wound received at sea, could be inquired of by the common law (certainly not, at least by the ordinary commissions of oyer and terminer within a county), because, though the place where the stroke was given might pertain to the realm of England, yet not being within the body of any county, no venire could come from thence, neither could the admiral inquire of it, because the death happened out of his jurisdiction."

The passage goes on to show that the inquiry could not be by



special commissioners under 27 Hen. VIII. ch. 4, or 28 Hen. VIII. c. 15, which are confined to murders at sea, and that it could not be inquired of by the constable and marshal, which was the opinion of Lord Coke, founded on the statute 13 Rich. II. stat. 2. But (says East), according to Lord Hale, it might be determined in B. R. sitting in the county where the party died, or by a special commission of oyer and terminer; and, after intimating that 33 Hen. VIII. ch. 23, might perhaps extend to such a case, East goes on to say (p. 336), that for taking away all doubts 2 Geo. II. ch. 21, was passed, which contains provisions that where any person shall be feloniously stricken or poisoned upon the sea, and shall die of the same in England, he may be tried in England. The last-mentioned statute was repealed by 9 Geo. IV. ch. 31, and section 8 of that statute contains the provision I have before referred to, which would seem in terms to apply to this case, except that the words "feloniously stricken" create a difficulty in construing the section so as to include the subjects of a foreign State. The 7th section of the same statute provides that British subjects may be tried in England for murder or manslaughter committed abroad.

COLERIDGE J. Before coming to the construction of the statute we must consider whether we have any right to legislate here for foreigners on board ships upon the high seas. How can we say whether one foreigner wounding another on the high seas commits a felony? Suppose by the law of a State the murder of a subject was not a capital offence, should we have power to say that when committed on the high seas by a foreigner we had the right to make it capital?

MARTIN B. Suppose all that occurred had taken place on board a French ship, would the prisoner be triable by French or English law?

CROMPTON J. It would be a felonious stroke if given by a British subject, but there can be no right to make it so against the subject of another State.

COCKBURN C. J. It seems to me that the 7th and 8th sections must be taken together, and that the 8th section relates to the same class of persons as the 7th, namely, British subjects; and therefore there was no jurisdiction to try this case.

COLERIDGE J. I am entirely of the same opinion.

*Cur. adv. vult.*

The judgment of the court was delivered on 2d May 1857, by WILLES J. We are of opinion that the conviction is wrong, and ought to be quashed. I should say that, although my brother Crompton concurs in this judgment, he is not answerable for the reasoning on which it is founded. The rest of the court think the reasons right.

The 8th section of 9 Geo. IV. ch. 31 was obviously intended to prevent a defeat of justice which, without it, might have arisen from the difficulty of trial, in cases of homicide where the death occurs in a different place from that at which the blow causing it was given, and that section ought not therefore to be construed as making a homicide cognizable in the courts of this country by reason only of the death occurring here, unless it would have been so cognizable in case the death had ensued at the place where the blow was given, which the homicide, in this particular case, would have been, by the 7th section, if the offender had been a British subject, but not otherwise.

In the present case the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas; and consequently, if death had then and there followed, no offence cognizable by the law of this country would have taken place.

The 8th section of 9 Geo. IV. ch. 31, therefore is inapplicable, and unless it be applicable, the conviction cannot be sustained. It must therefore be quashed, and the prisoner discharged.

*Conviction quashed.*

In *Regina v. Lewis*, the injury which caused the death was inflicted by one foreigner upon another, on board a foreign vessel, upon the high seas; and consequently if death had then and there followed, no crime cognizable by the law of England would have taken place. In *Regina v. Anderson*, 38 Law Journal M. C. at p. 14, counsel arguendo said that the conviction in *Regina v. Lewis* was quashed on the ground "that the prisoner was a foreigner, and that this country could not legislate for foreigners in such a case." But Blackburn J. observed that, "It was rather on the ground that the ship was a foreign ship." In the Privy Council it has been decided that the St. 9 Geo. IV. ch. 31, § 8, as to persons dying within the jurisdiction of felonious wounds given without the jurisdiction, does not extend to persons who were not otherwise amenable to the criminal jurisdiction of the court. *Nga Hoong v. The Queen*, 7 Cox C. C. 489 (1857). And it is to be observed that in the construction of various American statutes, although using words of unlimited meaning, they have been confined in their operation to crimes committed by persons over whom the tribunals of the particular State had undoubted jurisdiction.

Under the Extradition Treaty between Great Britain and the United States, a person charged with murder on the high seas, on board a British vessel, must be given up when claimed by Great Britain. Murder on the high seas, on board a British vessel, is not committed within the jurisdiction of the United States, though the vessel comes into a port of the United States. *Re Bennett*, 11 Law Times Rep. N. S. 488, United States District Court of Admiralty, Southern District of New York.

In *The State v. Carter*, 3 Dutcher, 499 (1859), the principle, that the laws of a State have no force *proprio vigore* beyond its territorial limits, was fully discussed. In that case, the mortal bruises were given in the city of New York, on the 29th of December 1858, and the death occurred in the State of New Jersey, on the 31st of December. It was decided that the courts of New Jersey had no jurisdiction. Vredenburg J., in an admirable judgment, said at p. 500: "If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable as such wherever he may see fit to die. It may be manslaughter, in its various degrees in one place; murder, in its various degrees in another. Its punishment may be fine in one country; imprisonment, whipping, beheading, strangling, quartering, hanging, or torture, in another; and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel." And after referring to a statute which related to murder only, and not to manslaughter, at p. 501: "I cannot make myself believe that the legislature in that act intended to embrace cases where the injury was inflicted within a foreign jurisdiction, without any act done by the defendant within our own. Such an enactment upon general principles, would necessarily be void; it would give the courts of this State jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons, in all cases where personal injuries were followed by death." And again at p. 502: "We have never treated acts done upon the vessels of other governments, as within our jurisdiction, nor has such ever been done by any civilized government."

This question of jurisdiction was again discussed and determined in *Tyler v. The State*, 8 Michigan, 320 (1860). It is a decision of a divided court, and the reasoning is any thing but satisfactory. Section 5944 of the Compiled Laws of that State is in the following words: "If any such mortal wound shall be given or other violence or injury shall be inflicted, or poison administered on the high seas, or on any other navigable waters, or on land, either within or without the limits of this State, by means whereof death shall ensue in any county thereof, such offence may be prosecuted and punished in the county where such death may happen." It is to be observed that this statute neither creates nor defines any crime. Tyler was charged with having wounded Jones in Canadian waters, whereof he died in Michigan. Manning J., in delivering the opinion of the majority of the court, said: "The consequences of the shooting were not confined to Canada. They followed Jones into Michigan, where they *continued* to operate until the crime was consummated in his death. If such a killing did not

by the common law constitute murder in Michigan, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in the State." In an able dissenting opinion, Campbell J. said at pp. 348, 349: "It is not pretended by any one that when Tyler shot Jones, he was at the time, in any sense offending against the State of Michigan. Had Jones died on the spot, this State could not have interfered with Tyler for it. Had Jones lived for a few months, although afterwards dying of his wounds, he might have traversed half the States of the Union, and Tyler could have had no voice in controlling his motions. He might go where murder is punished by death, or he might come here, where it is merely a state-prison offence; and yet Tyler would be responsible, if this prosecution can be maintained, to any State or country against which the voluntary choice of Jones might make him a constructive offender. It is importing into the criminal law a principle at variance with its whole reason."

In Massachusetts, the General Statutes, ch. 171, § 19, enacts: "If a mortal wound is given, or other violence or injury inflicted, or poison is administered, on the high seas, or on land either within or without the limits of this State, by means whereof death ensues in any county thereof such offence may be prosecuted and punished in the county where the death happens." In the case of *Commonwealth v. McLoon*, Suffolk, Supreme Judicial Court, January term 1869, which was an indictment for manslaughter, a question arose as to the construction of this statute. The indictment charged a beating, an exposure and starving, on board the ship *Themis*, on the high seas, as the means of death, and the death as ensuing in the county of Suffolk. The ship *Themis* was an English ship sailing under the English flag, from Liverpool to Boston. It was not alleged in the indictment that the defendants or either of them were citizens of the Commonwealth of Massachusetts, or were amenable to the laws thereof. It was contended that the courts of that Commonwealth had no jurisdiction. *Regina v. Lewis* was cited and relied upon by the counsel for the prisoners. The case was argued January 12 and 13, 1869, but it has not as yet been decided. It will probably be reported in vol. 100 *Massachusetts*.

See *Regina v. Lopez and Sattler*, Dearsly & Bell, C. C. 525; *Regina v. Anderson*, Law Rep. 1 C. C. 161; 38 Law Journal, M. C. 12 (1868.)

PIPER v. PEARSON.<sup>1</sup>

October Term 1854.

*Liability of Justices of the Peace.*

A judge of an inferior court, acting in a case of which he has no jurisdiction, or exceeding his jurisdiction, is liable in damages to any party injured.

Thus a justice of the peace, who, in the course of the trial of a case of which a police court has exclusive jurisdiction, commits a witness to prison for contempt, is liable to an action by the witness.

As the police court of Lowell has exclusive jurisdiction of all offences committed within that city, a record of a conviction, before a justice of the peace for the county of Middlesex, of an offence alleged to have been committed in the city of Lowell, shows *prima facie* a want of jurisdiction in the justice.

The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction.

ACTION of tort against a justice of the peace residing in Dracut, for assault, battery, and false imprisonment. Answer, that the plaintiff was imprisoned in the county jail, in due process of law, for a contempt of court.

At the trial, the plaintiff gave in evidence copies, certified by the defendant, of the following papers: A complaint made to the defendant, charging John Russ with an unlawful sale of intoxicating liquors in Lowell; and a warrant issued thereon, for the arrest of Russ; a mittimus issued by the defendant for the commitment of the plaintiff to prison, for refusing to testify on the trial of said complaint before the defendant at Lowell, concerning sales of intoxicating liquors, made by Russ, and known to the witness; and a subsequent judgment of acquittal of Russ by the defendant.

By St. 1848, ch. 331, § 4, the exclusive jurisdiction of all crimes and offences, committed within the district of Lowell, is vested in the police court of Lowell.

The defendant relied, for his justification, on the record of the judgment; and contended that no sufficient proof had been adduced to show that his acts were without jurisdiction, and void. But Metcalf J. ruled that the record and mittimus constituted no defence. And to this ruling the defendant, being found guilty, alleged exceptions.

<sup>1</sup> 2 Gray, 120.

*B. F. Butler*, for the defendant. Notwithstanding St. 1848, ch. 331, § 4, the defendant might still, as a justice of the peace, hold a court in Lowell for the trial of offences committed elsewhere in his county. Rev. Sts. ch. 85, §§ 31, 32. It does not appear where the offence was in fact committed; and the magistrate, actually sitting in the exercise of his office, will be presumed to be acting rightfully till the contrary be shown; at least so far as to protect him.

It does not appear but that he was judicially examining the very question of his jurisdiction in this case when the contempt took place. But the statute does not make the right of the magistrate to commit for contempt depend upon his jurisdiction of a particular case. It provides for two cases: first, "such disorderly conduct as shall interrupt any judicial proceedings before him;" or, second, "be a contempt of his authority or person." Rev. St. ch. 85, § 33. There were judicial proceedings pending before the defendant when he issued his mittimus; and he was the sole judge whether the conduct of the witness was in contempt of his authority, subject only to impeachment for the unjust exercise of his power. *Lining v. Bentham*, 2 Bay, 1. *The State v. Johnson*, 2 Bay, 385.

At the worst, it was but an error of judgment, for which he is not liable if he acted honestly. If the defendant is not protected, the judges of the circuit courts of the United States, who are occupied a great portion of the time in trying questions of their own jurisdiction, are liable in damages to the losing party, whenever they decide erroneously in favor of their own jurisdiction; and are not protected, in such cases, from interruption and insult.

The second clause of the statute is intended for the magistrate's protection, as well while he is out of court as while actually sitting. Otherwise, the moment a magistrate had passed upon a particular case, and his jurisdiction had ceased, he would be liable to insult, without any power to punish. By the common law, contemptuous words, spoken of a magistrate, though not interrupting his proceedings, are punishable by indictment. *Hollingsworth v. Duane*, Wallace, 77. *Brooker v. Commonwealth*, 12 Sergeant & Rawle, 175.

*H. G. Blaisdell*; for the plaintiff.

BIGELOW J. The decision of this case depends on the familiar and well-settled rule concerning the liability of courts and magis-

trates exercising an inferior and limited jurisdiction, for acts done by them, or by their authority, under color of legal proceedings.

One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But, on the other hand, if they act without any jurisdiction over the subject-matter; or if, having cognizance of a cause, they are guilty of an excess of jurisdiction; they are liable in damages to the party injured by such unauthorized acts. In all cases therefore where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is, whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test his legal liability will at once be determined. 1 Chitty Pl. (6th Am. ed.) 90, 209-213. *Beaurain v. Scott*, 3 Campbell, 388. *Ackerley v. Parkinson*, 3 Maule & Selwyn, 425, 428. *Borden v. Fitch*, 15 Johnson, 121. *Bigelow v. Stearns*, 19 Johnson, 39. *Allen v. Gray*, 11 Connecticut, 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non iudice* and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser. 1 Chitty Pl. 210. 19 Johnson, 39. See *Clarke v. May*, 2 Gray, 410.

These well-settled principles leave no room for question as to the liability of the defendant in this action. As a justice of the peace for the county of Middlesex, he had no jurisdiction whatever to try the complaint against Russ. It was for an offence committed "within the district of Lowell," of which the police court of the city of Lowell had exclusive jurisdiction by St. 1848, ch. 331, § 4, and which the justice of said court was legally competent to try and determine. *Commonwealth v. Emery*, 11 Cushing, 406. The defendant therefore acted wholly without legal authority, and can show no legal justification under any judicial record.

It was urged, on the part of the defendant, that he had authority to punish the plaintiff for contempt, although he had no juris-

diction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. It is to enable him to try and determine causes without molestation, and protect himself from indignity and insult, that the law gives him authority to punish such disorderly conduct as may interrupt judicial proceedings before him, or be a contempt of his authority or person. Rev. Sts. ch. 85, § 33. But it is only when he is in the proper exercise of his judicial functions that this power can be exercised. If he has no jurisdiction of a cause, he cannot sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he cannot try the case, he cannot exercise a power which is only auxiliary and incidental. *There can be no contempt, technically speaking, where there is no authority.* In the case at bar, the defendant had no more power to entertain jurisdiction of the complaint against Russ than any other individual in the community. Although he acted through mistake, it was nevertheless an usurpation. The plaintiff therefore could not have been guilty of contempt toward the defendant in his capacity as a magistrate, while trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void.

It was suggested, by the counsel for the defendant, that there was nothing in the case from which it could be properly inferred that the offence with which Russ was charged was actually committed in the city of Lowell; and that as the defendant, by virtue of his authority as a justice of the peace, had cognizance of offences committed elsewhere in the county of Middlesex, which he might well hear and determine in the city of Lowell, the presumption was that he was acting rightfully till the contrary was shown. But there are two decisive answers to this argument. In the first place, the record on its face, sets out an offence committed in the city of Lowell. That being a district set apart by statute, in which the police court has exclusive jurisdiction of criminal offences usually cognizable, by magistrates, and the offence being charged as having been committed in Lowell, the record legally



imports that it was committed there. 1 Starkie Crim. Pl. (2d ed.) 62. Bacon Ab. Indictment, G. 4.

But, in the next place, it was for the defendant to show a complete justification for the alleged trespass; if the record left it doubtful whether he had jurisdiction of the offence, it would not avail as a defence to the action. There is a marked distinction, in this respect, between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is, that they had jurisdiction, until the contrary is shown; but, with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction. *Peacock v. Bell*, 1 Saunders, 74, and notes. *Mills v. Martin*, 19 Johnson, 33, 34. The record in the present case *primâ facie* shows a want of jurisdiction in the defendant.

*Exceptions overruled.*

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### CALDER v. HALKET.<sup>1</sup>

December 5, 1839, and July 4 and 8, 1840.

#### *Liability of Judicial Officers.*

Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact.

The 21 Geo. III. ch. 70, § 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bonâ fide*, in cases in which they have mistakenly acted without jurisdiction.

THIS was an action of trespass, brought by the appellant against the respondent, in the Supreme Court of Judicature, at Fort William, to recover damages for the arrest and false imprisonment of the appellant, by the respondent, in his character of judge and

<sup>1</sup> 3 Moore P. C. 28. Before the Privy Council. On appeal from the Supreme Court of Judicature, at Fort William, Bengal. Present: Lord BROUGHAM, Baron PARKE, Mr. Justice BOSANQUET, The Right Hon. Dr. LUSHINGTON.

magistrate of the Foujdarry (Criminal) Court of the Zillah of Nuddeah in Bèngal.

The appellant was the manager of a factory at Bayadangah, in the same Zillah, belonging to Mr. David Andrews. Both the appellant and respondent were European British-born subjects. The proceedings which gave rise to the imprisonment complained of were as follows : —

On the 29th of July 1834 an affray took place in a village called Dutt Boahleah, within the Zillah of Nuddeah. On the following day, the police Darogah of the adjoining Thanah (police station) of Hanskolly, within which the village of Boahleah is situate, reported the particulars of the riot to the respondent, as acting magistrate of the Foujdarry Court of the Zillah of Nuddeah, and transmitted the depositions of the wounded persons, as well as of some of the witnesses, of the affray.

The respondent, Mr. Halket, being of opinion that the appellant was concerned in the riot, directed a Robocarree (or order of instructions for the mode of proceeding in the case) of the Foujdarry Court at Kishnaghur, to be made and passed, by which it was ordered, amongst other things, that a Perwannah should be written and directed to the Darogah, for the apprehension of Mr. Calder.

The Robocarree was signed by the respondent, and a Perwannah was accordingly issued on the same day, and delivered to the Darogah of the Thanah of Hanskolly; under the authority of which, the appellant was detained, and kept under surveillance of two Burhurdanzes (matchlock-men), within the boundaries of Mr. Andrews's factory.

The appellant was ultimately brought before Mr. Halket, the respondent, as acting judge of the Foujdarry Court, at Kishnaghur, and, after some days' investigation, admitted to bail; and was eventually bound by recognizance to appear when called upon. The greater part of the other prisoners charged with being concerned in the riot were convicted, and sentenced to different periods of imprisonment, but no further proceedings were taken against Mr. Calder.

Upon the 6th of March in the following year 1835, Mr. Calder commenced an action of trespass in the Supreme Court at Calcutta, against Mr. Halket, for assault and false imprisonment. The declaration contained three counts. The first alleged that the respon-

dent assaulted and imprisoned the appellant for thirty-four days, at Bayadangah. The second, that the respondent had laid hold of the appellant, and compelled him to go from a house in Bayadangah to a place called Poolia, and from Poolia back to Bayadangah, and then to Kishnaghur, and there imprisoned him for twenty-five days. And the third count alleged that the respondent had assaulted and imprisoned the appellant at Kishnaghur, for thirty-four days.

The respondent pleaded the general issue; and also six special pleas, justifying the said several arrests and imprisonments, as done by him as magistrate of the district of Nuddeah, in the province of Bengal, and of the Criminal Court of the same district.

The appellant joined issue upon the first plea, and replied *de injuria* to the six special pleas upon which issue was joined.

The cause came on for trial before the Supreme Court, on the 23d of July 1835, when several witnesses were examined on both sides, and a verdict was given for the plaintiff on all the issues joined in the action, with damages to the amount of five hundred sicca rupees, but with liberty for the respondent to move that the verdict should be set aside, and a nonsuit, or verdict for the respondent, entered instead thereof, upon three several points reserved; namely: 1st. That there was no proof of the arrest of the appellant by the respondent's order; 2d. That under the provisions of the statutes 21 Geo. III. ch. 70, § 24, and 53 Geo. III. ch. 155, § 105, and the Bengal Regulations in force in the Presidency, the respondent was not liable to the Supreme Court in an action for damages, the acts proved appearing in evidence to have been acts done by him as magistrate of the Provincial Court of Kishnaghur; and 3d. That under the general issue a sufficient justification was proved.

A rule *nisi* to that effect was granted on the 2d of November.

On the 24th of November 1835 the several points reserved were argued before the Supreme Court, who were of opinion that the arrest, having taken place under the seal of the Foujdarry Court, and the appellant being a British-born subject, and not amenable to the jurisdiction of the Foujdarry Court of the Zillah, the respondent had failed to support his special pleas. They were however of opinion, that, under the general issue, the respondent was entitled to avail himself of the protection of the 24th section of the statute 21 Geo. III. ch. 70, which precluded the Supreme Court

from holding jurisdiction in the action against the respondent, and accordingly adjudged that the verdict should be entered for the respondent on the general issue, with costs, and costs of motion.

From this judgment the appellant appealed to her Majesty in Council.

Mr. *M. D. Hill* Q. C. and *C. Buller*, for the appellant. The judgment of the Supreme Court cannot stand; they admit the trespass, but say they have no jurisdiction to try the question, the respondent having acted in his magisterial capacity, and not being amenable to the Supreme Court. This is contrary to law, as well as against the true construction of the acts 21 Geo. III. ch. 70, and 53 Geo. III. ch. 155. The rule at law is, that if an action be brought against a judge of record, for an act done by him in his judicial capacity, he must plead that he did such act as a judge of record, before he can avail himself of such justification. Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowper, 172. The respondent pleaded the general issue. Now supposing him to be a judge of record, that is clearly insufficient; but he also pleaded specially, that the acts were done by him in his magisterial capacity; yet the court held these pleas were not supported, but they held the plea of the general issue sufficient, under the 21 Geo. III. ch. 70, §§ 2, 24. That act was passed to explain and amend the previous one of 13 Geo. III. ch. 63, under which the Supreme Court was first established. By the second section, it is provided that persons impleaded in the Supreme Court for acts done by order of the governor-general in council, may plead the general issue. But the trespass of the respondent was not an act so done. The respondent is a judge of the Foujdarry Court, and, according to the Bengal Regulation I. of 1772, Judicial Regs. of 1769 to 1792, para. 5, first establishing that court, but an officer of police, having no jurisdiction over any but natives; and though appointed by the governor-general in council, the acts done by him in his judicial capacity never can be construed to be acts done by the order of the governor-general, so as to entitle him to plead the general issue. The 24th section of the act recites, that whereas it is reasonable to render the provincial magistrates, as well native as British-born subjects, more safe in the execution of their office, it is enacted that no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the county courts, for any judgment, decree, or order

of the said court, nor against any person for any act done by or in virtue of the order of the said court. Now, in the first place, this clause applies to the orders of the court, and not to the individual acts of the judge; and in the next place the judgments, orders, or decrees, intended by the legislature, are such as the judicial officer has authority to exercise; namely, over natives, and not over British subjects, who are not subject or amenable to the jurisdiction of the provincial magistrates. Here the respondent, a Mofussil magistrate, issues a Perwannah for the arrest of the appellant, a British-born subject, without the oath of any party being taken, without any charge made, without any accusation, or even accuser, but solely on his own suspicion, drawn, it may be, from the report of the Darogah, but of which the respondent is in utter ignorance. The act of 21 Geo. III. ch. 70 was never intended for such a case as this, nor can it be strained to meet it. If the construction given by the Supreme Court to the 24th section be correct, the appellant will be without redress at law; he cannot sue the respondent in the district in which the acts happened, and the native courts of Sudder and Nizamut are courts of appeal, without original jurisdiction. The consequence will be, that the local magistrates in India will enjoy a protection and immunity not possessed by a judge of the highest court of record in England.

Then it is said that the respondent, being a justice of the peace, had jurisdiction under the 53 Geo. III. ch. 155, § 105; but that clause applies only to cases of arrest of a party complained of, after the case has been heard and decided, and a fine imposed and not paid, and no property found within the district from which such fine could be levied. The question then is, whether the respondent, being, as it is admitted, a justice of the peace, and, as such, amenable to the Supreme Court, can be permitted to say, that the act done by him was in his capacity of judge of the Foujdarry Court, and not as a magistrate, and that as such judge he is entitled to plead the general issue, and to the protection of the 21 Geo. III. ch. 70. We do not contend that an action would lie against the respondent acting within his jurisdiction; the statute 21 Geo. III. ch. 70, protects the judges of the native courts in India in the same manner as those of 7 Jac. I. ch. 5, 21 Jac. I. ch. 12, § 15, and 42 Geo. III. ch. 85, § 6, protect the judges of our own courts; but if the act done be out of the jurisdiction of the judge, then he is not protected. *Bushel's Case*, 1 Modern, 119. *Hamond v.*

Howell, 1 Modern, 184, and 2 Modern, 218. *Miller v. Seare*, 2 Wm. Blackstone, 1141. This doctrine was admitted in *Dicas v. Lord Brougham*, 6 Carrington & Payne, 249, and formed the basis of the decision in *Mostyn v. Fabrigas*. If an act is done by a judge as judge of record, in his judicial capacity, then no action will lie against him. *Groenvelt v. Burwell*, 1 Lord Raymond, 454; 1 Salkeld, 200. But the Foujdarry Court is not a court of record: it is the native criminal court, created under the Regulation of 1772, at the same period as the Sudder, which has been held, as we are instructed by the Supreme Court of Calcutta, not to be a court of record. If a party, not being a judge of a court of record, improperly grants a warrant, on which another is imprisoned, an action lies. *Beardmore v. Carrington*, 2 Wilson, 244; *Burdett v. Abbott*, 14 East, 1; and he must plead specially. Now, though the warrant is sealed with the seal of the Foujdarry Court, the act of granting it was a ministerial and not a judicial act, and, being an excess of jurisdiction, an action will lie for it. *Beaurain v. Scott*, 3 Campbell, 388. The distinction between a ministerial and judicial act was taken and insisted on with great learning and ability, in a case in the Court of Common Pleas in Ireland. *Taaffe v. Downes*, Lord Chief Justice of the Court of King's Bench, 3 Moore P. C. 36. The plaintiff having been arrested upon a warrant from the chief justice, brought an action of assault and for false imprisonment, to which the defendant pleaded that he was chief justice of the King's Bench, and that as such, and in the course of his office of chief justice, issued his warrant. The plaintiff demurred, because the defendant did not justify by his plea the issuing the warrant, by setting forth the causes for which, as well as the authority, under which it was issued. The case was elaborately argued by the most eminent men at the Irish bar, and though the court gave judgment against the demurrer, one of the Judges, Mr. Justice Fletcher, being dissentient, yet the distinction between the ministerial and judicial acts of a judge, which formed the ground of his dissent, was not controverted by the other Judges, who only held that the act in question was legal and could not be questioned, because it was a judicial act. The chief justice however was a judge of record; even therefore admitting the case to have decided that a judge could not be questioned for an act ministerial, but in the nature of a judicial act, that decision cannot be relied on here; for there is no pretence for saying that the Foujdarry Court, is a court

of record, or its judges any thing higher than our justices of the peace. In *Tate v. Chambers*, 3 Nevile & Manning, 523, where a magistrate committed a man under the 39 & 40 Geo. III. ch. 99, § 8 (the Pawnbrokers' Act), for re-examination upon a charge of embezzlement, and not of penalty, as provided by the act, the magistrate was held liable to an action for exceeding his jurisdiction. The proceeding of the respondent was an act in pais, and not of record, for which he is not amenable if he has exceeded his jurisdiction; this, we maintain, he clearly has done; the judgment therefore entered up by the Supreme Court for the respondent on the general issue must be reversed, and the cause remitted back to the court to assess the damages due to the appellant, for the wrong and injury he has sustained.

Mr. Serjeant *Spankie*, Sir *William Follett* Q. C. and Mr. *Greenwood*, for the respondent. The action of trespass brought against the respondent by the appellant was not sustainable in the Supreme Court, for two reasons: first, because the respondent, acting *bonâ fide* in the execution of his office as magistrate of the Foudjarry Court, in a case within the jurisdiction of that court, is protected by the St. 21 Geo. III. ch. 70, §§ 2, 24, and 53 Geo. III. ch. 155, § 105; and secondly, because it did not appear upon the trial, nor was there any ground for the court to presume, that the respondent had any notice of the fact, or any reason to suppose that the appellant was not a native, and, as such, amenable to the jurisdiction of the Foudjarry Court. The sections 2 and 24 of the 21 Geo. III. ch. 70 must be taken together. The latter provides that no action shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country courts, for any judgment, decree, or order of the said court; and, by the former, any person impleaded in the Supreme Court for any act done by order of the governor-general in council, may plead the general issue. Now it is admitted that the parties engaged in the riot were natives, and, as such, amenable to the jurisdiction of the native courts. The appellant was the exception; he, it seems, was an European and a British subject. But how was Mr. Halket to know that circumstance? His name would not necessarily import the fact. He might be half-caste. It is clear that he was engaged with others, who were amenable to the jurisdiction of the Foudjarry Court, in a common breach of the law; when therefore he was apprehended, if he intended to avail himself of his privilege as a British subject,

he should have moved for a warrant to be discharged. That would have been the course here; and if he had that remedy, can he lay by, and then bring his action? But if a magistrate acts *bonâ fide*, he is protected against all unintentional errors; that is the principle upon which all the acts of parliament for their protection are framed, and the decisions of the courts are in accordance with that principle. *Weller v. Toke*, 9 East, 364. *Beechey v. Sides*, 9 Barnewall & Cresswell, 806. *Price v. Messenger*, 2 Bosanquet & Puller, 158. The 7 Jac I. ch. 5, made perpetual by 21 Jac. I. ch. 12, first enabled an officer, impleaded for the execution of his office, to plead the general issue. By the 42 Geo. III. ch. 85, § 6, this provision was extended to all persons having, holding, or exercising public employment in or out of the kingdom, and who, by law, are empowered to commit persons to safe custody; so that, independent of the statute 21 Geo. III. ch. 70, the respondent, being a person having legal authority to commit, if sued in this court, might have pleaded the general issue. But it is said that this arrest of the appellant was not within the intent or meaning of 21 Geo. III. ch. 70. The instrument of arrest is a *Perwannah*, which is something more than a warrant; for it sets forth the report of the *Darogah* on which it is founded, and then proceeds to order the arrest of the parties implicated in the riot, who are to be detained until the arrival of the presence, that is, the judge, and not brought, as would be the case here, immediately before him for examination. It is an order, and being sealed with the seal of the court, must be taken to be an order of the court, and, as such, is precisely within the 24th section of the act 21 Geo. III. ch. 70. Then is Mr. Halket liable to an action of trespass, for excess of jurisdiction in a matter over which he had already, as respected the natives, jurisdiction, without notice of the appellant's character of a British subject? That is contrary to the principle of all the cases. If a judge having jurisdiction exceed it by mistake, no action can be maintained against him. *Gwinne v. Poole*, 2 Lutwyche, 937. *Truscott v. Carpenter*, 1 Lord Raymond, 229. *Lowther v. Earl of Radnor*, 8 East, 113. In *Dicas v. Lord Brougham* there was no special plea; the plea of the general issue was held sufficient. If there is a general law, as an act of parliament, the court are bound to take notice of it; it need not be pleaded in abatement; that was settled in *Parker v. Elding*, 1 East, 352, and has been followed by *West v. Turner*, 6 Adolphus & Ellis, 614. The effect of reversing the



judgment of the Supreme Court would be to allow actions to be brought against individual Judges for the acts of the court ; that is plainly contrary to every dictum and decision to be found. The judgment therefore of the court below must be affirmed, and the appeal dismissed with costs.

Mr. *Hill*, in reply. The construction put upon 21 Geo. III. ch. 70, is inconsistent with the provisions of the act itself. It is contended that, by the 24th section, judicial officers are indemnified from any proceedings in respect of acts done by them as such ; but the two succeeding sections provide for the case of informations being brought against them for corrupt acts. The argument puts them too high. They may be indicted ; is that consistent with their being judges of record, and, as such, protected ? The Judges of the Court of Record here can only be proceeded against by impeachment ; they are amenable to parliament alone for their acts. Are the Judges of the Foujdarry Court in India on the same footing ? In the 53 Geo. III. ch. 155, § 105, the local courts are described as established by the East India Company ; they are not king's courts, in the sense of the superior courts here ; and, if not king's courts, then they have only a local and limited jurisdiction, and their Judges must be accountable for any excess in the exercise of it. If a judge acts in a matter or subject in which he has no jurisdiction, he is liable to an action ; but if he has jurisdiction, though he proceed erroneously, no action will lie. That was the distinction taken in *The Marshalsea Case*, 10 Rep. 69, 76, 2d Resolution, and by Holt C. J. in *Groenvelt v. Burwell* ; by Powell B. in *Gwinne v. Poole* ; and by De Gray C. J. in *Miller v. Seare*, 2 Wm. Blackstone, 1145 ; and was the foundation of the more modern case of *Ackerley v. Parkinson*, 3 Maule & Selwyn, 411. The argument, that the respondent had jurisdiction over natives, cannot be carried to give him any over British subjects, who are expressly exempted from the operation of the native courts. The arrest of the appellant was not a judicial act or founded on any judicial proceeding. The respondent had no right to do more than issue a summons, and immediately he found that the appellant was a British subject, he must have been discharged. He began by exceeding his authority as a magistrate, acting judicially when he ought only to have acted ministerially ; and proceeding summarily, when he ought first, at least, to have inquired and ascertained that he had jurisdiction to act at all. He is therefore not entitled to any

privilege, and ought not to be screened from the consequences of his own deliberate act.

**BARON PARKE.** The material question in this case is, whether the defendant, being a judge of the Foujdarry Court of the Zillah of Nuddeah, was in that character entitled to the protection of the 21 Geo. III. ch. 70, § 24, for issuing his order, or Perwannah, and for what was done in obedience to it.

This section is as follows: "And whereas it is reasonable to render the provincial magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted, That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country courts, for any judgment, decree, or order of the said court, nor against any person for any act done by or in virtue of the order of the said court."

Three meanings may be attributed to this clause.

1st. It may mean that no action should lie against one exercising a judicial office in the country courts, for any judgment, decree, or order of the court, whether in a matter in which the court had a jurisdiction or not, or whether the judge wilfully and knowingly gave judgment, or made an order, in a matter out of his jurisdiction or not; so that the fact of the existence of a judgment, decree, or order should preclude all inquiry.

2d. It may mean to protect the judge only where he gives judgment, or makes an order, in the *bonâ fide* exercise of his office, and under the belief of his having jurisdiction, though he may not have any.

3d. The object may have been to put the Judges of the native courts on the footing of Judges of the superior courts of record, or courts having similar jurisdiction to the native courts here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction.

It seems to us, that the first of these constructions is inadmissible. It never could have been intended to give such unlimited power to the Judges of the native courts; and reason points out that the general words of the clause must be qualified in the manner stated in one of the two latter modes of construction.

We think that the third is the right mode, and that the true

meaning of the section in question was to put the Judges of the native courts of justice on the same footing as those of English courts of similar jurisdiction. There seems no reason why they should be more or less protected than English Judges of general or limited jurisdiction, under the like circumstances. To give them an exemption from liability, when acting *bonâ fide* in cases in which they had, though mistakenly, acted without jurisdiction, would be to place them on a better footing than English Judges or magistrates, and to leave the injured individual wholly without civil remedy ; *for English Judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege ;* and the justices of the peace, whether acting as such or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

This construction is that contended for by the appellant, and to that extent we think the appellant is right. But in applying that rule to the facts in evidence in the present case, we think that enough does not appear to make the defendant a trespasser.

We must consider the defendant as being in the same situation as a criminal judge in this country, with the qualification, that he had no jurisdiction over one particular class, namely the European-born subjects of the British crown ; and the question is, whether he is liable to an action of trespass for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

If the particular character of the plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the defendant would have been protected, for it is not merely in respect of acts in court, acts *sedente curiâ*, that an English judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case of *Taafe v. Downes*, 3 Moore P. C. 36, and an order under the seal of the Foujdarry Court, to bring a native into that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and, whether there was any irregularity or error in it or not, would be dispunishable by ordinary process at law. But the protection would clearly not extend to a judicial act done wholly without jurisdiction ; and it is contended that this order, with reference to

a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the court; and the special jurisdiction given by the 53 Geo. III. ch. 155, § 105, did not warrant the mode of proceeding in this case, there being no information or complaint by a native; nor did that section of the statute authorize imprisonment in the first instance.

But the answer to the objection to the defendant's jurisdiction, founded on the European character of the plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the defendant knew or had such information, as that he ought to have known of that fact; and it is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus, in the elaborate judgment of Baron Powell in *Gwinne v. Poole*, 2 Lutwyche, Appendix, at p. 1566, it is laid down, that a judge of a court of record in a borough was not responsible as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or at least that he might have been cognizant but for his own fault; which last proposition Baron Powell illustrates by a reference to the case of *The Marshalsea Court*, 10 Rep. 686, which had jurisdiction only in certain cases where the king's servants were parties, who, being all enrolled, the judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Baron Powell (speaking of the case of a borough court), that the cause of action does not arise within the jurisdiction of the court, as it ought to do; but as the judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case, as in others, *ignorantia facti excusat*. Baron Powell lays down the same rule as to a party; but his opinion in that respect is disapproved of by Lord Chief Justice Willes, in *Moraria v. Sloper*, Willes, 35, but not so far as it relates to a judge or officer.<sup>1</sup>

The like rule has been followed in the case of magistrates acting

<sup>1</sup> Quoted in the judgments of Blackburn J. and Mellor J. in *Pease v. Chaytor*, 3 Best & Smith, at pp. 642, 654.

under the special powers of acts of parliament, who are not liable as trespassers, if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to show their want of jurisdiction. *Pike v. Carter*, 3 Bingham, 78. *Lowther v. Earl of Radnor*, 8 East, 113.<sup>1</sup> It is clear therefore that a judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact.

In the case now under consideration, it does not appear from the evidence in the case that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point therefore which is contended for by the plaintiff does not arise; and it is unnecessary to determine whether, if distinct notice had been given by the plaintiff to the defendant, or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a judge of record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction.

The only doubt their lordships have had in the consideration of this case is, whether the evidence was sufficient to show that the defendant knew or ought to have known that the plaintiff was a British-born subject. They have had none, that it was competent for the defendant to give his defence in evidence under the general issue, by force of the statute 42 Geo. III. ch. 85, § 6, if not at common law.<sup>2</sup>

<sup>1</sup> Cited in the judgments of Blackburn J. and Mellor J. in *Pease v. Chaytor*, 3 Best & Smith, at pp. 643, 654.

<sup>2</sup> See also the case of *Miller v. Hope*, 2 Shaw's Appeal Cases, 125 (1824), where it was held by the House of Lords (affirming the judgment of the Court of Session in Scotland), that an action of damages is not competent against a supreme judge, for a censure passed by him, while acting in his judicial capacity, on a counsel practising at the bar, and engaged in the cause then before the court, although it was alleged that the censure had been made injuriously, and from motives of private malice. "If Judges in any court," said Lord Robertson, at p. 134, "were liable to be called to an account for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, 'No man but a beggar, or a fool, would be a judge.'"

In a very ancient case it was laid down that "no man shall have an action on the case against a judge of record for giving a false judgment." Year Book, 9 Hen. VI. 60. 1 Rolle Ab. 92. The law, says Lord Bacon, has so much respect for the certainty of judgments and authority of Judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking either of the law or of the case and matter in fact. Maxims VII. In 1608 it was said in *Floyd v. Barker*, 12 Rep. at p. 25, that the superior Judges ought not to be called in question for any judicial proceedings by them except before the King himself, "for this would tend to the scandal and subversion of all justice; and those who are most sincere would not be free from continual calumniation." "No action," says North C. J., "will lie against a judge for what he does judicially, though it should be laid falsò malitiosè et scienter." *Barnardiston v. Soame*, 6 Howell State Trials, at p. 1096 (1674), citing *Floyd v. Barker*, 12 Rep. 23. Lord De Grey C. J. in *Miller v. Seare*, 2 Wm. Blackstone, at p. 1144. Lord Mansfield C. J. in *Mostyn v. Fabrigas*, Cowper, at p. 172. *Fray v. Blackburn*, 3 Best & Smith, 576.

A uniform series of decisions extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken<sup>1</sup> in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. Judgment of Chief Baron Kelly, in *Scott v. Stansfield*, Law Rep. 3 Exch. 220, 223; 37 Law Journal, M. C. 155. This subject was very elaborately considered and the authorities reviewed in *Yates v. Lansing*, 5 Johnson, 283; 9 Johnson, 395, in the Supreme Court and in the Court of Errors of New York. Lansing was Chancellor of the State, and had committed Yates, one of the officers in chancery, for malpractice and contempt. A judge of the Supreme Court discharged him, and thereupon the chancellor ordered him to be recommitted. He then brought an action to recover a statute penalty for the recommitment. It was held that the action would not lie, Chief Justice Kent observing that the chancellor may have erred in judgment in calling an act a contempt which did not amount to one, and in regarding a discharge as null when it was binding, and that the Supreme Court may have erred in the same way, but still it was but an error of judgment for which neither the chancellor nor the judges were or could be responsible in a civil action, and that such responsibility would be an anomaly in jurisprudence. "Whenever," said the Chief Justice, "we subject the estab-

<sup>1</sup> In *Thomas v. Churton*, 2 Best & Smith, 475, a coroner was held not liable to an action for words falsely and maliciously spoken by him in his address to the jury at an inquest, *Cockburn C. J.* intimating doubt whether he might not be liable if he used the words without reasonable and probable cause. It may be observed, that in England a coroner court is a court of record of very high authority. *Crompton J.* in *Thomas v. Churton*, at p. 478.

lished courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public they become contemptible." In a very recent case *Martin B. said*: "It appears to me that the opinion expressed by Chief Justice Kent, in the American case cited, puts this matter upon its proper foundation, and states that which is both sound law and good sense in reference to it." *Scott v. Stansfield*, Law Rep. 3 Exch. at p. 224.

"It is a general principle," said Mr. Justice Field, in an admirable judgment, "applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless Judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and be called upon in a civil action in another tribunal, and perhaps before an inferior judge to vindicate their acts. This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement. *Randall v. Brigham*, 7 Wallace, 523, 535.<sup>1</sup>

In *Taafe v. Downes*, 3 Moore P. C. 41, this subject was most elaborately and learnedly considered, and all the English authorities commented upon by the Court of Common Pleas in Ireland 1813. The defendant was the Lord Chief Justice of the Court of King's Bench in Ireland.<sup>2</sup> "The principle at law," said Fox J. at p. 51, "of exemption from being sued for matters done by Judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice, that the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely; it is calculated for the benefit of the people, by insuring to them a calm, steady, and impartial administration

<sup>1</sup> In this case it was determined that an action for damages does not lie against a judge of a court of general jurisdiction, for removing, whilst holding court, an attorney-at-law from the bar, for malpractice and misconduct in his office, the court being empowered by statute to remove attorneys for "any deceit, malpractice, or other gross misconduct;" and having heard the attorney removed, in explanation of his conduct in the transaction which was the subject of complaint. And such action will not lie against the judge, even if the court, in making the removal, exceeds its jurisdiction, unless perhaps in the case where the act is done maliciously or corruptly. This case is ably reported.

<sup>2</sup> This celebrated case was separately reported by Mr. Hatchell, A.D. 1815.

of justice;<sup>1</sup> it is a principle coeval with the law of the land and the dispensation of justice in this country; and is founded on the very frame of the Constitution; it is to be met with in the earliest books of the law; and has been continued down to the present time, without one authority or dictum to the contrary, that I have been enabled to find. . . . I think myself called upon, in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner, as may be requisite to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect; not to injure or infringe. It appears to be most necessary that a judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution;—they are only answerable for their judicial conduct in the high Court of Parliament; and without the existence of this principle, it is utterly impossible that there could be such a dispensation of justice, as would have the effect of protecting the lives or property of the subject. A judge must, — a judge ought to be uninfluenced by any personal consideration whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the Judges, — an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the right and liberties of the subject.” And at p. 42, Mayne J. said: “If you once break down the barrier of the dignity of the Judges, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility.”

“This freedom from action and question at the suit of an individual,” it has likewise been observed, “is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be; and it is not to be supposed beforehand, that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct.” Lord Tenterden C. J. in *Garnett v. Ferrand*, 6 *Barnewall & Cresswell*, 625, 626. In *Ferguson v. The Earl of Kinnoul*, 9 *Clark & Finnelly*, at p. 289, Lord Brougham said: “The courts of justice, that is the superior courts, courts of general jurisdiction, are not answerable, either as bodies or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment.”

<sup>1</sup> Cited by Parke B. in *Ryalls v. The Queen*, 11 *Queen's Bench*, at p. 796.



In *Kemp v. Neville*, 10 Common Bench (N. S.) 523, 547, 551 (1861),<sup>1</sup> some of the cases, showing the variety of occasions in which these rules have been applied, are collected in the elaborate judgment of the court delivered by Chief Justice Erle. He commences with the justly celebrated judgment of Powell B. in *Gwinne v. Poole*, 2 Lutwyche, Appendix, 1560, and proceeds as follows: "There, the defendant was held not to be liable in trespass, although, as judge of an inferior court, he had caused the plaintiff to be arrested in an action where the cause of action arose out of his jurisdiction; and, although the *capias* was issued without previous summons, and was not made returnable at a certain time, yet he was justified because he acted as judge in a matter over which *he had reason to believe* that he had jurisdiction. In *Floyd v. Barker*, 12 Rep. 23, the judge and the grand jury were held not liable to be sued in the Star Chamber for a conspiracy in respect of their acts in court, in convicting of felony. In *Hamond v. Howell*, 2 Modern, 218, the judge who committed for an alleged contempt, under a warrant showing that in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistaken judgment, together with the void warrant founded thereon, was no cause of action. In *Cave v. Mountain*, 1 Scott N. R. 132, and 1 Manning & Granger, 257, the justice who committed the plaintiff on an information which contained no legal evidence either of any offence or of the plaintiff's participation in that which was supposed to be an offence, was held not to be liable in trespass, because the information was considered to be directed against an offence over which the justice had jurisdiction, if there had been any proof thereof. In *Metcalf v. Hodgson*, Hutton, 120, the defendant was held not liable for taking insufficient bail in a cause in a local court, because in that court it was a judicial act by him. In *Garnett v. Ferrand*, 6 Barnewall & Cresswell, 611, the coroner who removed the plaintiff from the place of an inquest was held not liable in trespass, as the removal was ordered by him in a judicial capacity. In *Tozer v. Child*, 7 Ellis & Blackburn, 377, the church-warden was held not liable for refusing a lawful vote in a vestry, because, although he was acting partly in a ministerial capacity in receiving the votes, yet he was also acting partly in a judicial capacity in refusing a vote, and in that capacity he was not liable for a mistake, if he acted according to the best of his judgment. In *Calder v. Halket*, 3 Moore P. C. 28, the magistrate having jurisdiction over Asiatics in Bengal, but not over Europeans, was held not liable in trespass for an apprehension of the plaintiff under a warrant issued by him, he not knowing the plaintiff to be European. The Privy Council say that trespass will not lie for a judicial act without jurisdiction, unless the judge had the means of knowing the defect of jurisdiction; and it lies on the plaintiff in every case to prove that fact. In *Houlden v. Smith*, 14 Queen's Bench, 841, the judge of the county court was held liable in trespass because he was within the exception thus laid down, and had the means of knowing that he had no jurisdiction.<sup>2</sup> In *Taafe v. Lord Downes*, 3 Moore P. C. 36 note, the judge was justified by a plea in trespass showing a warrant issued by him in his capacity of judge,

<sup>1</sup> This case may also be found in Broom's Constitutional Law, 734, with a learned note in which numerous authorities are collected relating to the immunity enjoyed by the judges of the superior courts and various other officers exercising judicial or quasi-judicial functions.

<sup>2</sup> See the judgments of Blackburn J. and Mellor J. in *Pease v. Chaytor*, 3 Best & Smith at pp. 644, 655.

although the plea did not show that the warrant was lawful, but was purposely confined to the right of a judge to protection. Throughout these cases, and many others, the vital importance of securing independence for every judicial mind is earnestly recognized.

From this review of the cases the result seems to be that if the judge of a court, *not of record*, has a criminal or quasi-criminal jurisdiction in respect of the matter sub judice, the person charged, and the place where the offence is alleged to have been committed, he will be irresponsible for an act done in the exercise of his judicial functions. And with respect to the judges of courts of record, *there is no court equal to the trial of the superior judges for facts done in judicature*. See the argument for the defendant in error in *Sutton v. Johnstone*, 1 Term R. at p. 535.

But although the general principle thus laid down appears, at first sight, sufficiently clear and definite, difficulty may sometimes be felt in determining what acts can and what cannot properly be considered as judicial, so as to fall within its operation. *Taafe v. Downes*, 3 Moore P. C. 60, however, shows, that if it be once established that the particular act in question “emanated from and was appropriate to the *legal duties*” of the office of judge of a court of record, such act may be viewed as *purely judicial*, and therefore, within the rule. See *Brown v. Copley*, 8 Scott N. R. 350; per Lord Brougham in *Ferguson v. Earl of Kinnoul*, 9 Clark & Finnelly, at pp. 289, 290. Nor will the test here suggested be applicable merely to acts done in open court, it will apply also to such as are done at chambers; equal privilege in either case attaching to the judicial office. Per Lord Norbury, 3 Moore P. C. 60 note. *Broom Comm.* 104. 3d ed.

Judges and magistrates are responsible to the government from which they derive their authority, but not to individuals, for the negligent performance or wilful violation of official duty. They are liable to impeachment for corruption or other misconduct; but are exempt from answering in private actions for acts done in the course of the administration of justice, where they have jurisdiction of the cause, and of the party to be affected by the decision. *Wells v. Stevens*, 2 Gray, at p. 119. *Pratt v. Gardner*, 2 Cushing, pp. 68-70. *Brodie v. Rutledge*, 2 Bay, 69. *Upshaw v. Oliver*, Dudley, 241. *Bragdon v. Somerby*, 55 Maine, 92.

This rule has been illustrated in a variety of cases. Thus an action does not lie against a justice of the peace, for an error of judgment in taking a recognizance to prosecute an appeal in a form not authorized by law, and therefore invalid, *Chickering v. Robinson*, 3 Cushing, 543; nor for demanding excessive bail, *Evans v. Foster*, 1 New Hampshire, 374; nor for putting the defendant on trial, in a criminal case, without allowing him an opportunity to obtain witnesses and proofs favorable to him, and also to obtain counsel to advise and assist him. *Pratt v. Gardner*, 2 Cushing, 63. A justice of the peace who issues a writ returnable before himself, in favor of a third person for the recovery of a false and pretended claim, and secretes and destroys the writ after service and refuses to enter it, or to allow the defendant therein his costs, is not liable to an action by such defendant. *Raymond v. Bolles*, 11 Cushing, 315. The principle upon which these and similar cases turn is very simple: the difficulty is always found in applying it.

But, on the other hand, justices of the peace have always been held responsible to individuals, in civil suits, for all the injurious consequences arising from every illegal act they may have done, either in the adjudication of causes of which

they had no jurisdiction, or in the exercise of their ministerial powers, or in the discharge of their ministerial duties. If a justice of the peace issues a warrant under a statute which has been adjudged to be unconstitutional, he is liable in damages to a person arrested thereon. He could derive no power or jurisdiction from a void statute. *Fisher v. McGirr*, 1 Gray, 1. *Kelly v. Bemis*, 4 Gray, 83. *Barker v. Stetson*, 7 Gray, 54. If a justice of the peace who has convicted a person of an assault and battery, allows him to go at large for nearly a year without payment of the fine and costs, he has no right then to issue a mittimus for the commitment of such party without first issuing a *capias* for him to show cause why he should not be committed; and if the party is arrested upon the mittimus, the justice is liable in trespass. *Daggett v. Cook*, 11 Cushing, 262. If a justice of the peace renders judgment and issues execution after his jurisdiction has ceased, he is liable for an arrest made by virtue of such execution. *Spencer v. Perry*, 17 Maine, 413. See *Dyer v. Smith*, 12 Connecticut, 384. So if he issues a warrant against a person, as the father of a bastard child, no complaint having been made to authorize it. *Poulk v. Slocum*, 3 Blackford, 421. And a justice of the peace, who issues an execution, containing a command to arrest the body of the judgment debtor, and an attorney who procures such execution to be issued, and causes the debtor to be arrested thereon, in a case in which both know that the law prohibits such arrest or the issuing of such an execution, are jointly liable to the debtor in trespass. *Sullivan v. Jones*, 2 Gray, 570. Merrick J. said: "When, in the progress of a suit, a final judgment has been rendered, there can remain no further judicial duty to be performed. The court or magistrate has then no longer a question upon which to deliberate, or a cause between contending parties to decide. Nothing is left to be done but to carry the judgment into effect. That, under our law, is accomplished by means of an execution. It was early determined by this court that the issuing of such execution by a justice of the peace was merely a ministerial act; and in a particular instance, where such process was issued erroneously, the magistrate was held responsible in damages for the commitment to prison of a party under it. *Briggs v. Wardwell*, 10 Massachusetts, 356. This decision has never been brought into question; but, ever since it was made, has been acquiesced in and respected. *Blanchard v. Waters*, 10 Metcalf, 185. The case of *Kendell v. Powers*, 4 Metcalf, 553, may be cited as an instance in which the doctrine laid down in *Briggs v. Wardwell*, that a magistrate is liable to a party in a civil action for damages resulting to him from the illegal issuing of a final process upon a judgment rendered, was considered, both by the counsel of the parties, and by the court, so familiarly and firmly established, that it was not even adverted to as presenting any possible question for inquiry or debate."

The power given by statute to justices of the peace to punish for contempt persons duly summoned to testify before them who fail or neglect to appear, without reasonable cause, is only incidental and auxiliary to the trial of the cause in which the witnesses were summoned, and cannot be legally exercised, except during the pendency of such cause; after its final disposition by a judgment, the authority to punish such contempt ceases. *Clarke's Case*, 12 Cushing, 320. *Clarke v. May*, 2 Gray, 410. In this case the defendant, a justice of the peace, proceeded to punish contempt of this kind by a separate and independent proceeding. He was held to be guilty of an excess of jurisdiction,

which rendered him liable as a trespasser to the party injured. And see *The State v. Applegate*, 2 McCord, 110; *Lining v. Bentham*, 2 Bay, 1; *The State v. Johnson*, 2 Bay, 385; *Richmond v. Dayton*, 10 Johnson, 393; *Burnham v. Stevens*, 33 New Hampshire, 247.

There is this important qualification to the rule under consideration, which is lucidly stated in the text, by Baron Parke, and by Mr. Justice Bigelow in the case of *Clarke v. May*, 2 Gray, 410, 412: "That judges and magistrates cannot be held liable in trespass for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the judge or magistrate had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the judge or magistrate, in order to hold him liable for acts done without jurisdiction. Otherwise the maxim *Ignorantia facti excusat* applies." In *Clarke v. May*, 2 Gray, 410, this qualification was applied to the case of a justice of the peace, who, after finally disposing of a cause tried before him, committed a witness to prison for contempt at the trial. It was held, that he was liable to an action by the witness, as he was cognizant of all the facts which constituted the defect of jurisdiction in the proceedings against the witness. And see *Pike v. Carter*, 3 Bingham, 78; 10 Moore, 376; *Lowther v. Earl of Radnor*, 8 East, 113; *Baylis v. Strickland*, 1 Scott N. R. 540; *Fernley v. Worthington*, 1 Scott N. R. 432; *Houlden v. Smith*, 14 Queen's Bench, 841.

The acts of a justice of the peace, who has not been duly qualified, are not absolutely void.<sup>1</sup> Therefore persons seizing goods under a warrant of distress signed by a justice of the peace who had taken the oaths under a writ of *dedimus potestatem*, but had omitted to deliver a certificate, or take the oaths at the general sessions as required by statute, are not trespassers. The *Margate Pier Company v. Hannam*, 3 Barnewall & Alderson, 266. Although this decision turned upon the construction of a statute, still the reasoning of the court gives it a general importance, and an application to a large class of cases. Abbott C. J. delivered the judgment of the court. The question arose in this manner: "By an act of 51 Geo. III. ch. 36, his majesty is authorized to issue a commission, to be directed to certain persons to be therein named, constituting them to be justices of the peace within and throughout the liberties of the cinque ports, and investing them with the same power and authority as belongs to any mayor, bailiff, or jurat, to exercise within the liberties of the town whereof he is mayor, bailiff, or jurat, 'And from and after' (these are the words of the statute) 'such commission or commissions shall have so issued, all persons, and every person named in any such commission or commissions shall be and they and each of them is and are hereby declared to be justices and a justice of the peace within and throughout the liberties of the cinque ports, and invested with the same power and

<sup>1</sup> In *Coolidge v. Brigham*, 1 Allen, 333, it was determined that the validity of the appointment of a person who holds a commission as a justice of the peace and has taken the oaths of office, cannot be inquired into in a proceeding entirely collateral in its nature. "No rule of law is more firmly established," said Bigelow C. J., "than that which gives to the acts of an officer *de facto* the same efficacy and validity, so far as they affect third parties, as to those done by an officer *de jure*."

authority within and throughout the same,' as belongs to any mayor, bailiff, or jurat within his port or town. By the third section of this act it is provided and enacted, 'That no person or persons to be named in such commission shall be thereby, or by this act, authorized to act as a justice of the peace, unless he shall have such qualification as will authorize him to act for a county, and unless he shall have taken and subscribed the oaths, and delivered in at some general sessions to be holden in some one of the cinque ports, the certificate respectively required to be taken and subscribed and delivered in by persons qualifying themselves to act for counties.' The defendant, Dyson, had taken the oaths under a writ of *dedimus potestatem*, but he had omitted to deliver a certificate, or take any oath at any general sessions in any one of the cinque ports; and upon this omission the objection to the validity of his acts as a justice was grounded. We are of opinion, that, notwithstanding this omission, his acts as a justice, in the matters in question, were valid. An objection of the same nature may happen to arise in some cases of persons acting as justices for counties at large; and this gives a general importance to the question. By the St. 18 Geo. II. ch. 20, it is enacted, 'That no person shall be capable of being a justice, or acting as such for any county, without the qualification by estate therein mentioned, and who shall not take, at some general or quarter sessions, the oath therein prescribed.' And by the second section, 'Any person who shall act as a justice without having taken the oath, or without being qualified, shall forfeit £100.' It is obvious that if the act of the justice, issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority; a constable who arrests, and a jailer who receives a felon, will each be a trespasser; resistance to them will be lawful; every thing done by either of them will be unlawful; and a constable, or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction. 'Acts of parliament,' says Lord Coke, 'are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.' We think these acts do most reasonably admit of another construction. We think the *restraining* clauses are only prohibitory upon the justice. By the particular act upon which this question has arisen, Mr. Dyson, having been named in the commission, is declared to be a justice, and invested with power and authority as such. The proper effect therefore, as it seems to us, of the third section, is only to make it unlawful in him to act as such; but not to make his acts invalid. Many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The interest of the public at large requires that the acts done should be sustained; sufficient effect is given to the statutes by considering them as penal upon the party acting. No pecuniary penalty, indeed, is imposed by the St. 51 Geo. III.; but a justice acting contrary to its prohibitory

clause will subject himself, if not to the penalty of the 18 Geo. II., yet certainly to a prosecution by indictment."

But it is well settled that no one is entitled to the protection extended by the law to one clothed with the character of judge, unless he actually be such: therefore, if acting under an invalid appointment or commission, he will not be exempted from civil liability on the ground of enjoying judicial immunity. *Broom Comm.* 3d ed. *Gahan v. Lafitte*, 3 Moore P. C. 382, came on appeal before the Privy Council. The appellants had been appointed Judges of the Royal Court of St. Lucia under an invalid authority, and the respondent had in an action of trespass recovered damages against them for false imprisonment upon the ground that the appellants never having been properly appointed Judges, could not claim immunity as judicial officers. The court held that the action had been well brought.

It is the duty of every justice of the peace to insert in the record of each cause before him a full narrative of every thing which is necessary to exhibit its progress, and the final determination of it so far as he has had any official connection with it. The production of the record will be a bar to all inquiry respecting the truth or falsehood of the facts therein stated, and will conclusively establish the liability or immunity of the magistrate. "A record imports absolute verity, and no averment, plea, or proof is admissible to the contrary." *Kelly v. Dresser*, 11 Allen, at p. 33. In *Basten v. Carew*, 3 Barnewall & Cresswell, 652, 653; 5 Dowling & Ryland, 566, the principle was thus stated by Abbott C. J.: "It is a general rule and principle of law, that where justices of the peace have an authority given to them by an act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done." See *Lindsay v. Leigh*, 11 Queen's Bench, 455.

In *Wells v. Stevens*, 2 Gray, 115, it was decided that a record, made by a justice of the peace or justice of a police court in a criminal case, which does not state that an appeal was claimed from his decision by the party convicted, is conclusive evidence, in an action brought against the justice for refusing to allow the appeal, and committing the party to prison, that no such appeal was claimed. *Moore v. Lyman*, 13 Gray, 394. Neither can a magistrate's record of a criminal case within his jurisdiction and determined by him be impeached in an action against him for fraudulently and corruptly altering the complaint and warrant after the warrant had been served. *Kelly v. Dresser*, 11 Allen, 31.

"No principle is more firmly established," said Merrick J. in *Wells v. Stevens*, 2 Gray, 117, "than that which excludes oral testimony when offered to vary or contradict written judicial records. The record of a court of competent jurisdiction imports incontrovertible verity, as to all the proceedings which it sets forth as having taken place, and is of so high a nature that no averment can be made against it. It is necessarily a written memorial, and cannot exist partly in writing and partly in parol. The evidence afforded by it has the same force and efficacy in criminal, as in civil cases; and in the former is conclusive proof of the fact of conviction, and of the judgment, and as to all legal consequences resulting from it. *Comyns's Dig. Record, E.* *Ramsbottom v. Buckhurst*, 2 Maule & Selwyn, 565. *Sayles v. Briggs*, 4 Metcalf, 421. The records of justices of the

peace and of police courts, made in the performance of official duty, and in obedience to a positive direction of the statute, are evidence, as to the conduct and disposition of each particular cause of which they have taken cognizance, of as full and conclusive a character as those kept by courts of larger and more general jurisdiction. This was so declared and the rule enforced by this court in the case of *Sayles v. Briggs*, 4 Metcalf, 421. Upon the trial of that action, parol evidence was resorted to and received to show the existence of material facts not mentioned in the record of a magistrate, which one of the parties produced and used as an instrument of proof. It was afterwards determined that the parol evidence should have been rejected; and because it had been admitted, the verdict which had been returned was set aside, and a new trial granted. So also in the case of *Kendall v. Powers*, 4 Metcalf, 553, the facts disclosed, and the questions arising upon them, were very similar to those presented in this case; the only essential difference between them being that there it was the magistrate, and not, as here, the convicted party, who sought to bring in extrinsic evidence to establish a fact not stated in the record. It appeared from the record which was produced and read, that after he was convicted, Kendall appealed from the judgment and sentence awarded against him. Powers then offered to show that the appeal was subsequently waived and voluntarily withdrawn; but it was held that the record was conclusive, and the evidence inadmissible. It has been argued in behalf of the plaintiff that the evidence offered by him should have been received, because otherwise he can obtain no redress for the loss of the right of which he complains that he has been unjustly deprived; and also because a magistrate ought not to be allowed to shield himself from responsibility for an act of wrong or oppression by an additional violation of duty in neglecting or wilfully refusing truly to record the proceedings of a case tried before him. But the rejection of such evidence is an obvious and inevitable consequence of the incontrovertible verity which the law, for reasons, lying as it has been said at the foundation of all well-ordered jurisprudence, attaches to judicial records."<sup>1</sup> See also *Mather v. Hood*, 8 Johnson, 44; *Bigelow v. Stearns*, 19 Johnson, 39; *Cunningham v. Bucklin*, 8 Cowen, 178.

In *Brittain v. Kinnaird*, 1 Broderip & Bingham, 432; 4 Moore, 50;<sup>2</sup> it was held that where a magistrate has jurisdiction, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts stated in it, in an action against him. This was an action of trespass for seizing and taking possession of a certain vessel, and detaining the same. It appeared that the vessel in question, which was decked, and of the burden of thirteen tons, was seized by the defendants, as magistrates, under the Bum-boat Act. The plaintiff was about to offer evidence, that the vessel in question was not a boat within the meaning of the act, when it was objected by the counsel for the defendants, that the conviction was the only admissible evidence of what the magistrates had determined, and was conclusive as to the subject-matter of that determination. The court coinciding in that opinion, the conviction was put in, and appeared to

<sup>1</sup> In North Carolina, a justice of the peace has been held liable to an action for maliciously and unjustly refusing to grant an appeal from his own judgment. *Hardison v. Jordan*, Cameron & Norwood, 454.

<sup>2</sup> A case which "has been oftener recognized than almost any modern case." Coleridge J. in *Mould v. Williams*, 5 Queen's Bench, at p. 473.

be a conviction, for that the plaintiff unlawfully had in his possession in a certain boat, certain stores, &c. The following is the admirable judgment of Richardson J. : " Whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming, that the fact, which the magistrate has to decide, is that which constitutes his jurisdiction. If a fact decided as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case of a conviction under the game laws for having partridges in possession ; could the magistrate in an action of trespass be called on to show that the bird in question was really a partridge ? and yet it might as well be urged in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case, that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so ; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction ? In a question like the present we are not to look to the inconvenience, but the law ; but surely if the magistrate acts *bonâ fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action ; and the more so, as he might have been compelled by a mandamus to proceed on the investigation. Upon the general principle therefore that where the magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged."

In *Cave v. Mountain*, 1 Manning & Granger, 257, 261 ; 1 Scott N. R. 132, the following rule was laid down, which the court in *Regina v. Bolton*, 1 Queen's Bench, 74, 75, characterize as clear and satisfactory. " If," said Tindal C. J. " a magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." In this case, the justice who committed the plaintiff on an information which contained no legal evidence either of any offence or of the plaintiff's participation in that which was supposed to be an offence, was held not to be liable in trespass, because the information was considered to be directed against an offence over which the justice had jurisdiction, if there had been any proof thereof.

But where a magistrate committed a defendant for an alleged offence against one statute, and afterwards drew up a conviction for a different offence from that stated in the commitment, it was held that the conviction was no justification of the magistrate, in an action against him for false imprisonment. *Rogers v. Jones*, 3 Barnewall & Cresswell, 409 ; 5 Dowling & Ryland, 268. *Per Curiam* : " The commitment and conviction do not connect themselves together. A magistrate cannot justify a commitment for one offence by a conviction for another and different offence. Here the plaintiff has been imprisoned under a commitment for disobedience to an order of a magistrate, by which he was directed to pay 11s. as a recompense to the owner of the wood taken, and £20 to the overseers of the poor of the parish. It is difficult to say that that order and commitment



are founded on any statute. It would appear that the magistrate intended to proceed on the 15 Car. II. ch. 2, but the punishment is not warranted. The conviction upon which the magistrate relies, as a justification for this imprisonment, is founded on the 6 Geo. III. ch. 48, by which it is made an offence, wrongfully and maliciously to cut down trees without the consent of the owner. That conviction would have been an answer to an action for a commitment, in respect of the offence mentioned in it; but it is no justification of imprisonment for any other offence."

In *Daniell v. Phillippis*, 1 Crompton, Meeson & Roscoe, 662; 5 Tyrwhitt, 292; it was objected that the conviction did not support the commitment, for the former was for an injury to personal, the latter to real, property. But per Parke B. this objection ought not to prevail, because the commitment charges that the conviction is for the same offence, though in somewhat different language; and it proceeds upon the same statute as that on which the commitment is founded; in which respect this case is distinguishable from that of *Rogers v. Jones*, ubi supra, where the commitment and conviction were for offences against different statutes. In *Tarry v. Newman*, 15 Meeson & Welsby, 656, the same learned judge said that *Daniell v. Phillippis* is in point to show that the commitment must be read with the conviction, and construed in the same way.

One important practical consequence resulting from a judge being considered as a judge of a court of record is this, that the proceedings before him can be proved or disproved by the record thereof only, which record may be made up at any time, whenever it may become necessary to establish an issue duly raised. *Kemp v. Neville*, 10 Common Bench (N. S.) at p. 547. In this case at p. 552 authorities were cited by Erle C. J. in delivering the opinion, showing that the power to imprison made a judge a judge of record.

As to the mode of pleading by a judicial officer, relying on his immunity, in *Houlden v. Smith*, 14 Queen's Bench, at p. 852, Patteson J. says that a defendant acting as a judge of a court of record is protected from liability at common law, and therefore in such a case a plea of not guilty is sufficient.

In addition to the cases cited in this note as to the civil liability attaching to judicial officers, the following may be consulted: —

*Dicas v. Lord Brougham*, 6 Carrington & Payne, 249, and 1 Moody & Robinson, which was an action against the highest judge in the land, tried before Lord Lyndhurst C. B. *Hamilton v. Anderson*, 3 Macqueen House of Lords Cases, 363. There are two modern cases brought against ecclesiastical judges for unlawfully exercising the power of excommunication: *Beaurain v. Scott*, 3 Campbell, 388; and *Ackerley v. Parkinson*, 3 Maule & Selwyn, 411. As showing the liability which may attach to a commissioner of bankruptcy, the following cases may be noticed: *Miller v. Seare*, 2 Wm. Blackstone, 1141; *Dowell v. Impey*, 1 Barnewall & Cresswell, 163; Judgment of Lord Brougham, in *Ferguson v. The Earl of Kinnoul*, 9 Clark & Finnelly, at p. 291. It is impossible to notice the numerous cases concerning magisterial liability for acts done without, or in excess of, jurisdiction. In England the powers and immunities of justices now very much depend upon three statutes known as Jervis's Acts. There, the judges of the inferior courts are under the general supervision of the Court of Queen's Bench, where they may be proceeded against criminally for corruption or gross misconduct. They are removable for misdemeanor, either at common law or by statute.

REGINA v. ROWTON.<sup>1</sup>

1865.

*Evidence of Character.*

If evidence of good character is given on behalf of a prisoner, evidence of bad character may be given in reply (hæistante MARTIN B.)

But (dissentientibus ERLE C. J. and WILLES J.) in either case the evidence must be confined to the prisoner's general reputation; and the individual opinion of the witness as to his disposition, founded upon his own experience and observation, is inadmissible.

THE following case was stated by the Deputy Assistant Judge of the county of Middlesex.

James Rowton was tried before me, at the Middlesex Sessions, on the 30th of September 1864, on an indictment which charged him with having committed an indecent assault upon George Low, a lad about fourteen years of age.

On the part of the defendant, several witnesses were called, who had known him at different periods of his life; and they gave him an excellent character, as a moral and well conducted man.

On the part of the prosecution, it was proposed to contradict this testimony; and a witness was called for that purpose. This was objected to by the defendant's counsel, who contended that no such evidence was receivable, and cited the case of *Regina v. Burt*, 5 Cox C. C. 284.

I thought the evidence was admissible; and, after the witness had stated that he knew the defendant, the following question was put to him: "What is the defendant's general character for decency and morality of conduct?" His reply was: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

It was objected that this was not legal evidence at all of bad moral character.

<sup>1</sup> Leigh & Cave C. C. 520. 10 Cox C. C. 25. 34 Law Journal, M. C. 57.

I considered that it was some evidence; and I left the weight and effect of it, as an answer to the evidence of good character, to be determined by the jury.

The defendant was convicted, and is now in prison awaiting the judgment of your Lordships.

The questions upon which I respectfully request your decision are, —

*First.* Whether, when witnesses have given a defendant a good character, any evidence is admissible to contradict?

*Secondly.* Whether the answer made by the witness in this case was properly left to the jury?

This case was argued on the 19th of November 1864 before POLLOCK C. B., WILLES J., CHANNELL B., BYLES J. and SHEE J. by *Sleigh*, for the prisoner, and *Taylor*, for the Crown. At the conclusion of their argument the court took time to consider their judgment; but, there being a difference of opinion among the Judges, a re-hearing before the full court was directed; and accordingly, on the 21st and 28th of January 1865 the case was again argued before COCKBURN C. J., ERLE C. J., POLLOCK C. B., WILLIAMS J., MARTIN B., WILLES J., CHANNEL B., BYLES J., BLACKBURN J., KEATING J., MELLOR J., PIGOTT B. and SHEE J.

*Sleigh*, for the prisoner. Evidence is not admissible in reply to evidence of good character. That point was decided in *Regina v. Burt*, 5 Cox C. C. 284, where witnesses were called to give the prisoner a general good character, and it was held by Martin B. that it was not competent to the prosecution to call witnesses in reply to give evidence of the prisoner's general bad character. Such evidence is inadmissible on the broad principle that character forms no part of the issue on the record.

COCKBURN C. J. Then why is evidence of character admitted at all?

*Sleigh.* It first of all came to be admitted in capital cases only in *favorem vitæ*. 2 Russell on Crimes, 784 note (z). 3d ed.

WILLES J. The subject is ably discussed in a recent work on the criminal law by Mr. Fitzjames Stephen. See Stephen's General View of the Criminal Law, pp. 311, 312.

*Sleigh.* It is true that in the text books it is laid down that evidence of bad character can be given in reply to evidence of good character adduced by the prisoner. Thus in Buller's *Nisi Prius*,

7th ed. p. 296, the law is stated to be that, "In other criminal cases (i.e. cases where the defendant's character is not put in issue by the prosecution) the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so by calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally." Similar statements are to be found in Russell on Crimes, vol. 2, p. 784, 3d ed.; Taylor Ev. vol. 1, p. 350, 4th ed.; Starkie Ev. vol. 2, p. 304, 3d ed.; Phillipps Ev. vol. 1, p. 507, 10th ed.; Roscoe's Crim. Ev. p. 96, 6th ed; Best Ev. p. 326, 2d ed. But they are all based on the passage already cited from Buller's Nisi Prius, which is itself alleged to be founded on *Martyn v. Hind*, 2 Cowper, 441, a case which does not appear to be in point, and on *Clark v. Periam*, 2 Atkyns, 337, where it is said that, "If there is a criminal prosecution, and the prisoner, in order to strengthen the evidence for his character, enters into particular facts to support it, this is called a challenge to the prosecutor; and then he may likewise examine to particular facts." That however is clearly an error; for it is thoroughly established that only general evidence of character can be given, and not evidence of particular facts. Best Ev. p. 327, 2d ed. *Rookwood's Case*, 13 Howell State Trials, 211, per Holt C. J. Starkie Ev. vol. 2, p. 304. 3d ed. Best on Presumptions of Law and Fact, p. 215. *Rex v. Davison*, 31 Howell State Trials, 190. *Sharp v. Scogin*, Holt N. P. C. 541. *Mawson v. Hartsink*, 4 Espinasse N. P. C. 102. *The Attorney General v. Hitchcock*, 11 Jurist, 478. *J'Anson v. Stuart*, 1 Term R. 754.

Secondly, assuming that evidence of general bad character can be given in reply, this evidence was wrongly admitted, on the ground that evidence of general reputation only can be given, and that nothing which amounts to an individual opinion can be received. Character and reputation both mean credit derived from public opinion or esteem. When the witness in this case said that he knew nothing of the opinion of the neighborhood, he should have been stopped. The best definition of character is to be found in a speech of Erskine's, when he was counsel for Hardy, 24 Howell State Trials, 1079. "You cannot," he says, "when asking to character, ask what has A. B. C. told you about this man's character. No; but what is the general opinion concerning him.

Character is the slow-spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion; that general opinion is allowed to be given in evidence." In *Rex v. Jones*, 31 Howell State Trials, at p. 310, the following passage occurs:—

"Mr. *Park* (to the witness). 'During the time you did know him (the prisoner), what was his general character for integrity?'

"Answer.—'During the whole time I knew him I considered him a man not only of unexceptionable but of most honorable character.'

"LORD ELLENBOROUGH. 'It is reputation; it is not what a person knows. There is hardly one question in ten applicable to the point; it is very remarkable, but there is no branch of evidence so little attended to.' Individual opinion can only be given so far as it goes to the general reputation; and a witness who has known the defendant longest will have the best chance of knowing what his general reputation is.

*Taylor*, for the Crown. Evidence in reply to evidence of good character is clearly admissible. *Rex v. Stannard*, 7 Carrington & Payne, 673. 2 Hawkins P. C. ch. 46, § 206. Viner Ab. tit. Evidence, M. a. 1. 6.

COCKBURN C. J. We require no argument upon that point.

MARTIN B. I shall not differ from the rest of the court; but I have great doubts whether a practice which has existed for two hundred years should be altered.

POLLOCK C. B. There is no doubt that evidence of bad character could not be given, unless the prisoner had himself raised the issue by calling witnesses to show he bore a good one.

*Taylor*. As to the second point, there is no rule of law excluding the answer here given. It was scrupulous and conscientious evidence of character. The witness says, in effect, "In my opinion as a pupil the defendant's character was very bad."

COCKBURN C. J. Is general evidence of good character to be met by the particular opinion of an individual?

*Taylor*. All evidence is admissible, unless it be excluded by some rule. What was given in evidence here was evidence of the prisoner's disposition; for that, and not reputation, is the sense in which the word "character" is used in these cases.

COCKBURN C. J. I do not understand that to be the meaning of the word "character."

ERLE C. J. I agree with Mr. Tayler that the question of character is a question of disposition, and that reputation is admissible only because it is some evidence of disposition.

*Tayler.* The prisoner, by giving evidence of character, raises the issue that he is of such a disposition as to make it more than ordinarily improbable that he should have committed the offence charged against him. Character, in that sense, and reputation do not stand on the same basis. The latter should rather be defined as estimated character. Evidence of character may include or exclude the witness's own observation. In this case it was founded on the observation of the witness and of his two brothers. By opinion the witness means judgment. Reputation is only the repetition of the judgment of others. The witness's evidence was hearsay of the judgment of others mixed up with his own judgment founded on his own observation. There is no rule of law that, to make evidence of reputation admissible, it must be founded upon the judgment of a definite number. If, then, the judgment of ten or a less number of men is admissible under the name of reputation, how can the judgment of one only, that is, how can the estimate of disposition formed by one man only, or, in other words, individual opinion, be excluded. All evidence of character must be simply the repetition of what the witness has heard other persons say of the prisoner's disposition, or it must be his own judgment of the prisoner's disposition founded on his own personal observation, or, thirdly, it may be those two combined. A man cannot go about to collect the opinion of others concerning a person of whom he is ignorant, in order that he may give evidence of that person's character. *Mawson v. Hartsink*, 4 Espinasse N. P. C. 102.

POLLOCK C. B. No; for that would be giving the character on hearsay. A man who lives in the neighborhood gives the character on his own knowledge. What you pick up of a man's reputation in the neighborhood in twenty years is not hearsay.

*Tayler.* There is only one judicial authority to exclude individual opinion; and that is what Lord Ellenborough says in *Rex v. Jones*, vide supra p. 336.

COCKBURN C. J. I have always heard it objected to.

*Tayler.* There are authorities to show that character must be

taken in the sense of disposition, and that individual opinion of disposition founded upon actual observation is admissible. What was admissible as evidence of character was much discussed in *Rex v. Davison*, 31 Howell State Trials, 99, et seq. Throughout that case the witnesses for the defence were asked their opinion of the prisoner's disposition; and, upon the Attorney General taking an objection to the statement of particular facts of good conduct, Lord Ellenborough observes (31 Howell State Trials, p. 187), "The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offence charged in the information." In another place (31 Howell State Trials, p. 189) Lord Ellenborough himself asks a witness, "From your knowledge of Mr. Davison's character and conduct, do you think him capable of committing a fraud?" In *Rex v. Murphy*, 19 Howell State Trials, 725, evidence was admitted in support of the prosecutor's character; and the individual opinion of each witness was taken without objection. When the text-books say that evidence of general reputation only can be given, they mean evidence of general character as distinguished from evidence of particular facts.

COCKBURN C. J. I have always understood the law to be correctly stated in Phillipps on Evidence, Vol. I. 10th ed., p. 506, where it is said, "The inquiry must be as to the general character; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period would not then begin to act a dishonest, unworthy part. Proof of particular transactions in which the defendant may have been concerned is not admissible as evidence of his general good character.

"What then is evidence of general character? The best medium of proof is by showing how the person stands in general estimation; proof that he is reputed to be honest is evidence of his character for honesty, and the species of evidence most properly resorted to in such inquiries. It frequently occurs indeed that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favor to the prisoner than strictly as evidence of general character."

*Taylor.* Character means the general, uniform tenor of a man's

conduct got at by witnesses giving their own judgment. There is no difference between evidence of the character of a prisoner and that of a witness; and in the latter case individual opinion is admissible.

COCKBURN C. J. As to the character of a witness individual opinion is clearly admissible; but, in reference to the character of a prisoner, do you contend that such an answer as this could be received: "I know nothing of the prisoner's reputation, but my own opinion is," &c.?

*Taylor.* I do. A man might have a servant for many years whom he might know from experience to be perfectly honest, yet whose character he might happen never to have heard discussed. If the principle contended for on the other side is correct, this man would be excluded from giving evidence of his servant's character. Yet it is clear that he would be better able to form a true judgment of his servant's honesty than those whose acquaintance with the man was confined to what his neighbors said of him.

*Sleigh* was heard in reply.

COCKBURN C. J. This case turns upon the admissibility of an answer given by a witness who was called to rebut evidence of good character which had been given in favor of the prisoner, and who was asked what was the prisoner's general character for decency and morality. The answer was in these terms: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality." The chief question for us is whether that answer was proper to be left to the consideration of the jury. I am of opinion that it was not, and that the conviction cannot stand.

There are two questions to be decided. The first is whether, when evidence of good character has been given in favor of a prisoner, evidence of his general bad character can be called in reply. I am clearly of opinion that it can be. It is true that I do not remember any case in my own experience where such evidence has been given; but that it is easily explainable by the fact that evidence of good character is not given when it is known that it can be rebutted; and it frequently happens that the prosecuting coun-



sel, from a spirit of fairness, gives notice to the other side, when he is in a position to contradict such evidence. But, when we come to consider whether the evidence is admissible, it is only possible to come to one conclusion. It is said that evidence of good character raises only a collateral issue ; but I think that, if the prisoner thinks proper to raise that issue as one of the elements for the consideration of the jury, nothing could be more unjust than that he should have the advantage of a character, which, in point of fact, may be the very reverse of that which he really deserves.

Assuming then that evidence was receivable to rebut the evidence of good character, the second question is, was the answer which was given in this case, in reply to a perfectly legitimate question, such an answer as could properly be left to the jury ? Now, in determining this point, it is necessary to consider what is the meaning of evidence of character. Does it mean evidence of general reputation or evidence of disposition ? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged ; but no one has ever heard the question — what is the tendency and disposition of the prisoner's mind ? — put directly. The only way of getting at it is by giving evidence of his general character founded on his general reputation in the neighborhood in which he lives. That, in my opinion, is the sense in which the word "character" is to be taken, when evidence of character is spoken of. The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried. We are not now considering whether it is desirable that the law of England should be altered — whether it is expedient to import the practice of other countries and go into the prisoner's antecedents for the purpose of showing that he is likely to commit the crime with which he is charged, or, stopping short of that, whether it would be wise to allow the prisoner to go into facts for the purpose of showing that he is incapable of committing the crime charged against him. It is quite clear that, as the law now stands, the prisoner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbors. So too evidence of antecedent bad conduct would form equally good ground for

inferring the prisoner's guilt, yet it is quite clear evidence of that kind is inadmissible. The allowing evidence of good character has arisen from the fairness of our laws, and is an anomalous exception to the general rule. It is quite true that evidence of character is most cogent, when it is preceded by a statement showing that the witness has had opportunities of acquiring information upon the subject beyond what the man's neighbors in general would have; and in practice the admission of such statements is often carried beyond the letter of the law in favor of the prisoner. It is moreover most essential that a witness who comes forward to give a man a good character should himself have a good opinion of him; for otherwise he would only be deceiving the jury; and so the strict rule is often exceeded. But, when we consider what, in the strict interpretation of the law, is the limit of such evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. Some time back, I put this question — Suppose a witness is called who says that he knows nothing of the general character of the accused, but that he has had abundant opportunities of forming an individual opinion as to his honesty or the particular moral quality that may be in question in the particular case. Surely, if such evidence were objected to, it would be inadmissible.

If that be the true doctrine as to the admissibility of evidence to character in favor of the prisoner, the next question is, within what limits must the rebutting evidence be confined? I think that that evidence must be of the same character and confined within the same limits — that, as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, showing that the evidence which has been given in favor of the prisoner is not true, but that the man's general reputation is bad. In this case the witness disclaims all knowledge of the general reputation of the accused. I take his meaning to be this: "I know nothing of the opinion of those with whom the man has in the ordinary occupations of life been brought into contact. I knew him; and so did two brothers of mine, when we were at school; and in my opinion his disposition" (for that is the sense in which the word "character" is used by the witness) "is such, that he is capable of committing the class of offences with which he stands charged." I am strongly

of opinion that that answer was not admissible. As, when a witness is called to speak to the character of the accused he cannot say, "I know nothing of his general character, but I have had an opportunity of forming an opinion as to his disposition, and I consider him incapable of committing this offence:" so here, when the witness declared that he knew nothing of the general character of the accused, but that in his opinion the prisoner's disposition was such as to make it likely that he would commit the offence in question — applying the same principle — the answer was inadmissible. But, if an objectionable answer is given to an unobjectionable question, the judge who presides at the trial should stop the answer before it is completed, or, if that is impossible, should tell the jury that they must withdraw it from their consideration; and then the answer would not prejudice the case. Here however it was not so. The learned judge expressly left the answer to the jury, and directed them to take it into account and balance it against the evidence of character given in favor of the prisoner. That being so, the answer became a part of the case, and cannot be treated as an objectionable answer inadvertently given to an unexceptionable question. I beg in conclusion that it may be understood that I do not offer any opinion as to what the law should be, or what evidence of character should be admissible, either in favor of the prisoner, or in reply on the part of the prosecution. I find it uniformly laid down in the text-books that the evidence to character must be general evidence of reputation; and dealing with the law as I find it, my opinion is that the answer given in this case was inadmissible, and that the conviction ought not to stand.

ERLE C. J. I concur with the Chief Justice of England on many points of the judgment that he has just delivered. The admissibility of evidence of character for the prisoner stands on peculiar grounds. The question of the admissibility of evidence that the good character given to the prisoner is undeserved is now brought for the first time before us for adjudication. The progress of our law should be adapted to the interests of society: and the rules relating to the admissibility of evidence should be regulated by attending carefully to the interests of truth. If the prisoner having a bad character misleads the court by calling witnesses to say that he has a good one, in the interests of truth and justice the false impression should be removed; and I quite agree with the Chief

Justice of the Queen's Bench upon the first question, that evidence was admissible in this case to rebut the good character given to the prisoner. With respect to the second question, I agree that evidence of individual facts is to be excluded; but whether the answer given by the witness in this case is in the nature of an individual fact or not I do not stop to inquire, because a question of very general importance has been raised; and, with reference to that question, I am of opinion that the answer, understood as evidence of disposition, is admissible.

Now, what is the principle on which evidence of character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of the party accused, and basing thereon a presumption that he did not commit the crime imputed to him. Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be founded either on personal experience, or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. The question between us is, whether the court is at liberty to receive a statement of the disposition of a prisoner, founded on the personal experience of the witness, who attends to give evidence and state that estimate which long personal knowledge of and acquaintance with the prisoner has enabled him to form. I think that each source of evidence is admissible. You may give in evidence the general rumor prevalent in the prisoner's neighborhood, and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumor. I never saw a witness examined to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say, "This man has been in my employ for twenty years. I have had experience of his conduct; but I have never heard a human being express an opinion of him in my life. For my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world." The principle the Lord Chief Justice has laid down would exclude this evidence; and that is the point where I differ from him. To my mind, personal experience gives cogency

to the evidence ; whereas such a statement as “ I have heard some persons speak well of him,” or, “ I have heard general report in favor of the prisoner,” has a very slight effect in comparison. Again, to the proposition that general character is alone admissible the answer is that it is impossible to get at it. There is no such thing as general character ; it is the general inference supposed to arise from hearing a number of separate and disinterested statements in favor of the prisoner. But I think that the notion that general character is alone admissible is not accurate. It would be wholly inadmissible to ask a witness what individual he has ever heard give his opinion of a particular fact connected with the man. I attach considerable weight to this distinction, because, in my opinion, the best character is that which is the least talked of.

The arguments of Mr. Tayler upon this branch of the case have commanded my assent. They are strongly confirmed by the case of *Rex v. Davison*, 31 Howell State Trials, 99. In that case Lord Ellenborough held — and all the counsel engaged in it were of the same opinion — that the personal experience of a witness, or his opinion founded upon his personal experience, was admissible. According to my recollection there were thirteen witnesses to character called in that case ; and five or six gave evidence of very considerable personal experience of the prisoner, so as to show the means they had had of forming an opinion upon his disposition. The first witness stated the length of time that the prisoner had been employed under government and in other situations ; and he was not interfered with till he came to the statement of a specific transaction. Then Lord Ellenborough stopped him, saying that particular facts were not admissible. Each of the witnesses was asked as to his means of knowledge and his opinion of the prisoner’s disposition ; and Lord Ellenborough says, “ The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offence charged in the information.” This is very strong proof that the practice is to stop a witness when he refers to particular facts only, but to leave him at liberty to give his opinion founded on those facts. In this particular case the question was, “ What was the character of the prisoner ; ” and, if the answer had been, “ I knew him when I was his pupil, and I say that his character is bad,” and it had stopped there, it would, in my opinion, have been unobjectionable. It was a

statement of personal experience ; and the witness gave his answer according to the general inference which he had drawn from that experience. But the witness added a specific fact — the opinion of his brothers. Strictly, that specific fact was not admissible ; but in a grave case involving a very important question, I cannot rest my decision on the particular answer. On the general principle which I have stated, I think that both questions ought to be answered in the affirmative, and that the conviction should stand.

COCKBURN C. J. I would not for a moment make any attempt at a reply on any thing that has fallen from the Chief Justice of the Common Pleas. I am only anxious not to be misunderstood in the judgment I have pronounced. So far from excluding, I admit that negative evidence, such as “I never heard any thing against the character of the man,” is the most cogent evidence of a man’s good character and reputation, because a man’s character is not talked about till there is some fault to be found with it. It is the best evidence of his character that he is not talked about at all ; and in that sense such evidence is admissible.

MARTIN B. With respect to the second question, I concur with the Chief Justice of the Queen’s Bench. In my judgment, the answer of the witness to the question put to him was not general evidence of character, but was an answer that related to particular facts known to himself and his brothers ; and I think that the learned judge was wrong in allowing such evidence to go to the jury.

With respect to the first question, I do not mean to differ from the judgment that has been delivered by the Chief Justice of the Queen’s Bench, and shall act upon it, as I am bound to do ; but if the question depended upon myself, I should have taken further time to consider. The question is whether or not, when witnesses have been called to give a character to a prisoner, witnesses may be called to give evidence of bad character. The law of England is a law of practice and of precedent. That which has been the practice for years constitutes the law ; and when any precedent or practice is found wrong, the legislature interposes and puts the matter on a right footing. Now, in this particular case the indictment charged the prisoner with committing an indecent assault.

If I were investigating for my own private satisfaction whether or not the prisoner did commit this offence, my first inquiry would be what was the prisoner's character ; and, if the answer was, that he was notoriously addicted to acts of this sort, that answer would influence me as much as any thing else. But, if a man were indicted in a court of law, no one could give such evidence to a jury. The jury are sworn to try whether an assault was actually committed or not : and the witnesses are sworn to give evidence upon that issue ; and their evidence must be confined to matters bearing upon it. But a practice has sprung up, when a man is accused of an offence of any kind, to admit evidence of his good character, with respect to the species of crime charged against him, with the view of showing the unlikelihood of his committing that crime. It seems to me that this is an anomaly ; but it has been allowed, as I learn from the text-books, not as bearing upon the issue, but in *favorem vitæ*, as a matter permitted by the benignity of the law. This practice has prevailed for the last 200 years ; and in no single recorded instance during the whole of that period has evidence of general bad character been given in reply to evidence of the prisoner's good character. It is quite true that in several treatises it is stated that such evidence is admissible — and any expression of opinion coming from the authors of those works is worthy of the highest possible consideration — but none of them say it has ever been done. I am not at all unconscious of the strength of the observations made by the Lord Chief Justice of the Queen's Bench upon this point. It is a common practice, when the counsel for the prisoner intimates an intention of calling witnesses to character for the counsel for the prosecution to caution him as to what he is about to do ; and so the evidence is not offered. But, as no instance has been adduced in which evidence of this sort has been admitted, the conclusion I come to is, that the better way of treating the matter would be to consider the admission of evidence of good character as an anomaly and leave it as it stands, and to say that evidence of general good character is admissible on behalf of the prisoner, but that there such evidence is to end, and that no evidence is to be allowed in reply. If evidence of bad character is admitted, it will be followed by two speeches ; and I can imagine cases in which far too much weight would be placed on such evidence, and where convictions might be obtained wrongly. Suppose a man tried for robbery in the street and evidence given as to

his good character, and suppose then the counsel for the prosecution calls a policeman to say that he has known the man for years as a common thief in the street, and that he has himself apprehended him when engaged in picking pockets. In such a case there would be great danger that the prisoner would be tried on the evidence of character instead of that bearing more directly upon the offence charged. As however the other Judges take a different view, I acquiesce in their opinion, and shall act upon it when called upon to do so.

WILLES J. I am of opinion that upon both questions the ruling of the judge was right. As to the first question, whether evidence was admissible on the part of the prosecution to rebut evidence of good character given in favor of the prisoner, I should be glad if the court could have come to the conclusion that such evidence should be rejected, and that for the reasons stated by my brother Martin. But I am clearly of opinion that the court cannot come to that conclusion ; because, looking to the statements in the books of practice, such as Roscoe, Phillipps, and Starkie, it seems clear that such evidence must have been given for a series of years. Their information upon that point is not derived from books ; and, therefore, they must have spoken from their knowledge or from a tradition of the practice. The fact that no case is reported in which such evidence was given does not operate upon my mind ; because there were no *Nisi Prius* reports until a comparatively recent period, and therefore such cases could not be reported. I have said I should be glad if I could hold that the evidence was not admissible ; because I cannot help thinking that it is very inconvenient that a course should be resorted to which is exceedingly unusual, for which no precedent can be produced, of which there is no information at the bar or upon the bench, and which, whatever may be the state of the law upon the subject, seems to have been found to be inconvenient, and for that reason to have become obsolete. However, as the law is so, I must hold that such evidence is admissible, and that, where a counsel deems it essential to the cause which he represents, the judge is bound to receive it.

With respect to the second question, I agree in opinion with the Lord Chief Justice Erle ; and had the decision of the court to do only with the admissibility of evidence in answer to evidence of character on the part of the prisoner, I should not have made any



remarks at all ; because, for the reasons which I have stated, and from the infrequency of the occurrence of such a case, and from the improbability that it will often happen that such evidence will be offered in future cases, it would not be useful to make any remarks upon the subject.' But I cannot help thinking that our decision will have an important effect upon the evidence that may be given on the part of the prisoner ; and, if I were to remain silent, I should be seeming to assent to what I think would be a great hardship on prisoners in only being permitted to do that as a favor which they have heretofore done, according to my view, as a matter of right. I entirely agree with the Lord Chief Justice of England, that it is a mistake to suppose that, because the prisoner only can raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible, because it renders it less probable that what the prosecution has averred is true. It is strictly relevant to the issue ; but it is not admissible upon the part of the prosecution, because, as my brother Martin says, if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life ; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence, which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity ; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine. There are cases in which it is allowable to go into the prisoner's antecedents, as for the purpose of showing that he has had opportunities of committing the offence, or that in a particular instance his act could not have been accidental. But these cases only establish the principle that a relevant fact which incidentally casts a slur upon the prisoner is not thereby rendered inadmissible, when it is part of the direct evidence in the case. The ultimate fact to be arrived at by such evidence is that the prisoner's character, in the sense of the particular disposition which nature or education may have given him, is good and not evil. You can, no doubt, go into the question of reputation, and inquire as to the opinion of others concerning the man. But I apprehend that his disposition is the prin-

cial matter to be inquired into, and that his reputation is merely accessory and admissible only as evidence of disposition ; and, when it is stated that general evidence is alone admissible, that, in my opinion, does not mean merely general evidence of the opinion of others as to the prisoner's character, but general evidence of the disposition of the man. Evidence of particular facts is excluded, because a robber may do acts of generosity ; and the proof of such acts is therefore irrelevant to the question whether he was likely to have committed a particular act of robbery. Such evidence is excluded partly for the reason already given, and partly because no notice has been given to the other side that such an inquiry is going to be made. This is in accordance with the practice of the law when the charge is general. In the case of an indictment for barratry the prosecutor may prove any number of particular facts ; but it is usual to give notice of the acts intended to be relied upon on the trial ; and, if that is not done, a judge will make an order for particulars. The impossibility of giving such notice with respect to the prisoner's conduct would exclude such evidence, even if it were not excluded by general rules of policy. Evidence of character is however admissible on the part of the prisoner, not only in the sense of what people in general think of him, which is mere rumor, but also in the sense of what is known of him generally in the judgment of the particular witness, which judgment is superior in quality and value to mere rumor. Numerous cases may be put in which a man may have no general character in the sense of any reputation or rumor about him at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few ; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character without having acquired it which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but the members of his master's family : so the character of a child is only known to its parents and teachers, and the character of a man of business to those with whom he deals. I apprehend that there is nothing to prevent a man of business from calling every person with whom he has dealt for years, and

asking each in succession whether he was a person according to the witness's observation, of an honest and just character; and such evidence would be of the highest value. But, if a witness to character were to say that the man had got a good character in the parish, it might be that he had gained it because he had gone through the parish offices with decency; and the witness may have had no opportunity of judging of the man's real character and disposition. According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a court of law? It is said in answer that we are to be guided by the practice. But I apprehend that the practice is not merely to call persons to say that a man has a good character in the neighborhood, but also to call his master or the people with whom he has been acquainted to say what character he has borne in their judgment and what is his disposition. Such a practice must either stand altogether on sufferance, or the real character of the man must be arrived at by calling persons who have had an opportunity of knowing him.

If, then, such evidence may be admitted upon the part of the prisoner, the evidence admissible to rebut it must be at least as extensive. The evidence in this particular case was of a very peculiar character, because the prisoner was charged with an offence which would not only be committed in secret, if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case, in order to ascertain the prisoner's character for morality and decency, the persons of whom you would inquire would be those who had been within the reach of his influence — persons who would not be likely to communicate his conduct to the neighborhood or to one another. Here there was called a person who had been at the prisoner's school, and who stated that, according to his opinion, formed on his experience, the prisoner was capable of the grossest indecency and the most flagrant immorality. I understand this witness to say, "I have been at that man's school; and, having been there, I can say from what I know and what I have learned from my brothers who were there also, that his character is most immoral and indecent." It appears to me that that evidence of the man's character comes within the scope of the principle I have been referring to, and ought to have been admitted, if any evidence of the prisoner's bad character is to be admitted at all. Had I tried the case, although I certainly,

should have endeavored to persuade the counsel for the prosecution not to attempt that which was unusual, yet in administering the law according to the custom of England and the usage and practice which have prevailed, if he had insisted on offering the evidence, I should have admitted it, and have fallen into the same mistake, which as appears from the judgment of the majority of the court, the learned judge who had to deal with the case has done.

COCKBURN C. J. I am desired by my Brother Byles to say that, though he takes no part in the judgment, not having heard the whole of the argument, he entirely concurs in the view of the majority of the Judges on both points.

The other learned Judges concurred in the judgment delivered by the Lord Chief Justice of England. *Conviction quashed.*

The term "character," is not, as some of the ablest Judges<sup>1</sup> in the leading case considered it to be, synonymous with "disposition," but it simply means "reputation," or the general credit which a man has obtained in public opinion. A witness therefore, who is called to speak to character, cannot give the result of his own personal experience and observation, or express his own opinion, but in strict law he must confine himself to evidence of mere general repute. This rule has to a certain extent been modified by the Judges. Aware that "the best character is generally that which is the least talked about,"<sup>2</sup> they have found it necessary to permit witnesses to give negative evidence on the subject, and to state that "they never heard any thing *against* the character of the person on whose behalf they have been called."<sup>3</sup> Indeed some of the Judges have gone so far as to assert that evidence in this negative form is the most cogent proof of a man's good reputation.<sup>4</sup> 1 Taylor Ev. § 325. 5th ed.

Evidence of the general character of the prisoner, or of the party on whom the crime is alleged to have been committed, is tendered for the purpose of raising a presumption of innocence or guilt. Formerly, evidence of the prisoner's good character was held to be admissible, in *favorem vitæ*, in capital cases only. *Rex v. Harris*, 2 State Trials, 1038. And see *Commonwealth v. Hardy*, 2 Massachusetts, at p. 318, per Sewall and Parker JJ. But at the present day such evidence is admitted in all criminal prosecutions. It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received.<sup>5</sup> It is however submitted

<sup>1</sup> Erle C. J. and Willes J. ante pp. 337, 343, 346.

<sup>2</sup> Erle C. J. ante p. 344.

<sup>3</sup> Cockburn C. J. ante p. 345.

<sup>4</sup> Cockburn C. J. ante p. 345.

<sup>5</sup> In 1664 in *Rex v. Turner*, 6 Howell State Trials, at p. 618, Hyde C. J. said to the jury:

that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual whose character was unblemished, has or has not committed the particular crime for which he is called upon to answer. 3 Russell on Crimes, 300. 4th ed. See 1 Starkie Ev. 75, London ed. 1853; 1 Taylor Ev. § 326, 5th ed.; *The State v. Wells, Coxe*, 429; *United States v. Roudenbush, Baldwin*, 514; *McDaniel v. The State*, 8 Smedes & Marshall, 402; *The State v. Schaller*, 14 Missouri, 502.

"I cannot in principle," said Mr. Justice Patteson, "make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case." *Rex v. Stannard*, 7 Carrington & Payne, 673. In *Commonwealth v. Hardy*, 2 Massachusetts, 317 (1807), which was an indictment for murder, Parsons C. J. said that "he was of opinion that a prisoner ought to be permitted to give in evidence his general character in all cases; for he did not see why it should be evidence in a capital case, and not in cases of an inferior degree. In doubtful cases, a good general character clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts."

But this species of evidence is confined exclusively to criminal proceedings; and so strict is the rule, that on the trial of an information, filed in the Exchequer by the Attorney General, for keeping false weights, and for offering to corrupt an officer, this evidence was rejected by Chief Baron Eyre, who said: "It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime such evidence is admissible, but where the prosecution is not directly for the crime, but for the penalty, as in this information, it is not." *The Attorney General v. Bowman*, 2 Bosanquet & Puller, 532 note (1791). See *Thayer v. Boyle*, 30 Maine, at p. 480. In a recent case, *The Attorney General v. Radloff*, 10 Exchequer, 84 (1854), which was a proceeding in the Court of Exchequer, on the part of the Attorney General, to recover penalties by means of an information, Martin B. at p. 96, said: "The proper

"The witnesses called, in point of reputation, I must leave to you. I have been here many a fair time. Few men that come to be questioned, but shall have some come and say 'he is a very honest man; I never knew any hurt by him;' but is this *any thing against the evidence of the fact?*"

meaning of 'crime' is an indictable offence. The question has frequently arisen, whether an information at the suit of the Attorney General, for penalties for smuggling, be a criminal proceeding. I believe it has invariably been considered not to be so. One test, and a very obvious one, is, whether, in such a case, the character of the defendant be admissible in evidence. It has been decided that it is not. In criminal cases, evidence of the good character of the accused is most properly, and with good reason, admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime; but in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present, and the reason given is (as indeed it must be) that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that therefore the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed."

The inquiry must be confined, except where the *intention* forms a material ingredient in the offence, to the *general* character of the prisoner, and must not condescend to particular facts; for although the common reputation in which a person is held in society may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree, according to circumstances, may still fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or cruel act. But the mere proof of isolated facts can afford no such presumption. 1 Taylor Ev. § 326. And see *Rex v. Davison*, 31 Howell's State Trials, at pp. 187, 217, per Lord Ellenborough. Evidence of character must of course be applicable to the nature of the charge; for instance, to prove that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty.

Although the defendant is allowed to introduce this kind of testimony, the prosecutor cannot, in the first instance, have recourse to the same loose testimony, as the means of establishing the guilt of the accused; but if, with the view of raising a presumption of innocence, witnesses to character are called for the defence, the counsel for the government may then give evidence to rebut and counteract this presumption. 1 Taylor Ev. § 327. *Commonwealth v. Webster*, 5 Cushing, 525. *The People v. White*, 14 Wendell, 111. *Bennett v. The State*, 8 Humphreys, 118. And if the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent for the government to prove that, *subsequently to that time*, his character had been bad. *Commonwealth v. Sacket*, 22 Pickering, 394. Per Curiam: "The defendant having put his character in issue, it was competent for the government to prove that it was not good; but his counsel contend that the inquiries should have been confined to the period anterior to the supposed commission of the offence charged. We are not aware of any rule to that effect. Evidence of a bad reputation, subsequently acquired, may indeed be of little weight, but still it will have some bearing, as, commonly, the descent from virtue to crime is

gradual. We decide that such evidence is competent, but it is to be received with great caution." And see *Carter v. The Commonwealth*, 2 Virginia Cases, 169; *The State v. Merrill*, 2 Devereux, 269; *The State v. Upham*, 38 Maine, 261, 263.

In *Commonwealth v. Webster*, 5 Cushing, 324, Chief Justice Shaw, with reference to this kind of evidence, charged the jury as follows: "There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defence. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny, or other lesser crime. He may show that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like this of murder to prove a high character, and, by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character."

In *The State v. McAllister*, 24 Maine, 139, it was decided, that if a defendant offers no evidence of good character, the prosecutor is at liberty to raise an inference, in an argument to the jury, of the guilt of the defendant, or of his bad character. But this decision which is contrary to every feeling of humanity, to say nothing of principle, has been expressly overruled. *The State v. Upham*, 38 Maine, 261. In this case, the case of *Ackley v. The State*, 9 Barbour, 609, was cited and sustained. In delivering the opinion of the court, Hathaway J. said: "The prosecutor cannot be permitted to offer testimony concerning the prisoner's character, unless the prisoner enable him to do so by introducing testimony in support of it. 2 Russell on Crimes, 704. 3 Greenl. Ev. § 25. Where, upon the trial of an indictment, no proof as to the general character of the person is given, the law presumes that it is of ordinary fairness. If he choose to give no evidence upon the subject, the jury is not at liberty to indulge

in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. *Ackley v. The People*, 9 Barbour, 609. The rulings of the presiding judge in this matter cannot be sustained, either upon principle or authority. The defendant might well repose upon the legal presumption of his innocence, without apprehending that he incurred the danger of furnishing the basis for an argument against him, by neglecting or declining to introduce witnesses to prove his character good, when the law presumes it to be so." And see acc. *The People v. Bodine*, 1 Denio, 281, 314; *The State v. O'Neal*, 7 Iredell, 251.

In regard to the character of the person on whom the offence was committed, no evidence is in general admissible, the character being no part of the *res gestæ*. Thus, where evidence was offered to prove that the person killed was in the habit of drinking to excess, and that drinking made him exceedingly quarrelsome, savage, and dangerous, and, when intoxicated, he frequently threatened the lives of his wife and others, whom the prisoner had more than once been called upon to protect against hisury, all which was matter of common notoriety; it was held rightly rejected, as having no connection with what took place at the time of the homicide. *The State v. Field*, 14 Maine, 244. In *Commonwealth v. York*, 7 The Law Reporter, 507, before Shaw C. J., Wilde, and Hubbard, JJ., the counsel for the prisoner asked leave to introduce evidence to the effect, that the deceased was "a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter." Shaw C. J.: "The general rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestæ*. The only exception is in the case of a rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In *Regina v. Smith*, 8 Carrington & Payne, 168, the expression probably arose from boasts made by the deceased, and proved as parts of the *res gestæ*. The cases of *The State v. Tackett*, 1 Hawks, 210, and *Quesenberry v. The State*, 3 Stewart & Porter, 308, stand alone, and are not of such authority as to require us to leave the established course of practice."

In *Commonwealth v. Hilliard*, 2 Gray, 294, which was an indictment for murder, the counsel for the prisoner offered evidence, that "the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man, of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm." By the Court: "The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the Commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the deceased acted must be judged of by the *res gestæ*; and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant." On an indictment for murder, the prisoner cannot, as tending to



show provocation, introduce evidence to prove "the vicious temper, nature, and disposition of the deceased." *Brucker v. The State*, 19 Wisconsin, 539. On a trial for manslaughter, evidence that the deceased was a man of great muscular strength, and practised in seizing persons by the throat in a peculiar way, which would at once render them helpless, and shortly take away life, is inadmissible for the defendant. *Commonwealth v. Mead*, 12 Gray, 167. And see *The State v. Thawley*, 4 Harrington, 562; *Monroe v. The State*, 5 Georgia, 85; *The State v. Barfield*, 8 Iredell, 344; *The State v. Tilly*, 3 Iredell, 424; *Wright v. The State*, 9 Yerger, 342; *Commonwealth v. Hopkins*, 2 Dana, 418; *Pritchett v. The State*, 22 Alabama, 39.

On a charge of murder, expressions of good-will and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes. 1 Phillipps Ev. (London ed. 1843) 470.

The law of Scotland is stated as follows in Alison's Practice of the Criminal Law, p. 629: "Evidence as to character is of weight in a doubtful case, and is always competent; and in cases of homicide, assault, rape, or the like, the panel may lead evidence as to the temper of the injured party. Common sense demonstrates, that in all cases where the scales of evidence hang at all even, proof of character must be of considerable weight; because it is far more unlikely that a person of good character would commit a disgraceful offence than one of abandoned or dissolute habits. For these reasons, our practice uniformly admits a proof of good character on the prisoner's part although it only allows, in very special cases, evidence of bad character to be led by the prosecutor, and that only when it specially has reference to the charge in hand, as habit and repute to one of theft or previous conviction to any offence. The rule of evidence is still stricter; the prosecutor is never allowed to refer to the proved bad character of the prisoner, as heightening the probability that he has been guilty of any particular criminal action; while the prisoner is always allowed to refer to the character he has established, if favorable, as casting the balance in his favor in a doubtful case. From its very nature however such proof of character can be available only in doubtful cases. If the facts of the libel are clearly established, and the felonious intent is evident,—as if the stolen goods are found in his custody, and he is identified as the thief by the person from whom they were taken,—it is obviously in vain for him to refer to his general character, as rendering it unlikely that he committed that proved offence. But in cases of a more doubtful complexion,—as where there is a doubt as to the veracity of the prosecutor's witnesses,—proof of character often interferes with decisive effect in the prisoner's favor. This is in an especial manner the case in all those instances where the facts are proved or admitted, and the question is *quo animo* they were committed; as if stolen goods are found in his custody, or money suspected to be embezzled is traced into his possession. Honesty and integrity of character are of the greatest moment in all such cases, in supporting any account which he may be able to give as to the innocent or unintentional possession of such articles. In cases of assault or homicide in rixa, the character of the prisoner as a man of an easy temperament, not likely to be ruffled or put into a passion, is obviously of great importance in determining the question, often involved in obscurity, by whom

the affray was commenced, or who was most to blame during the progress. Such proof accordingly is clearly competent, and has been frequently admitted in practice. For the same reason, the panel's former acts of aggression, if violent and repeated, and especially if recent, are just grounds of presumption against him, as they show the true character, the *quo animo* of the fatal blow. Such matters, accordingly, may always be proved by the prosecutor *de recenti*, and even for a remote period, if libelled on under the name of previous malice; and in every case, if the panel begins to cross-examine, or point to evidence as to his peaceable character, the prosecutor, till his proof is closed, may rebut it by contrary evidence. Sometimes a proof of the character of the party injured is competent, in relation to the matter libelled. Thus, in assaults or homicides in *rixa*, proof of his quiet, peaceable temper, is competent, and has been frequently admitted. In cases of rape also the character of the woman may competently be inquired into, as it enters into the essence of the question whether the connection was forced or voluntary. In several cases such proof has been admitted, both of general loose behavior and specific acts of impropriety, though at the distance of years before; and they enter so deeply into the essence of the case, and their relevancy and competency can never be the subject of dispute."

In a very recent crown case reserved, the question was considered, how far, in the first instance, the prosecutor can have recourse to this kind of testimony, not for the purpose of establishing the guilt of the accused, but to show that the witness, a policeman, had had probable cause for arresting him on suspicion that he had committed a felony. *Regina v. Turberfield*, 34 Law Journal, M. C. 120; *Leigh & Cave C. C.* 495; 10 Cox C. C. 1. Upon an indictment for assaulting a peace officer in the execution of his duty, where the assault was committed by the prisoner in resisting his arrest by the officer on a charge of felony, the officer cannot, upon his examination in chief, be questioned as to his knowledge of the prisoner's character for the purpose of showing that he had reasonable cause to suspect the prisoner of having committed the felony for which he was arrested. The proper course, under such circumstances, is to ask the officer generally whether he had reason to suspect the prisoner, leaving the prisoner's counsel to inquire into the grounds of the suspicion, if he thinks fit to do so. Pollock C. B.: "We are all of opinion that the question ought not to have been put to the police constable in the form in which it was put. The question is, 'What did you know had been the prisoner's previous character?' It is not, 'What did you know of the prisoner?' but, 'What did you know of the prisoner's character?' It was open to the police constable to state in general terms that he had reason to suspect the prisoner of having stolen the trees; but we think that he was not justified in his examination in chief in going into the grounds of his suspicion. Those may be inquired into by the other side, if they think fit, upon cross-examination. Then the police constable's answer was rather worse than the question, and brought out what it is the object of the law to prevent coming out in that way so as to damage the prisoner." *Regina v. Turberfield*, *Leigh & Cave C. C.* 495; 10 Cox C. C. 1. "It is submitted that this decision is erroneous," writes Mr. Greaves in a learned note. "Every constable is justified in arresting any person whom he has reasonable grounds to suspect of having committed a felony; and in every case where the question arises whether he had such reasonable grounds of suspicion, it is perfectly clear that it is competent to prove the grounds of such

suspicion; otherwise a right to apprehend would exist without the power of justifying the arrest. In civil cases (unless the defendant be authorized to plead the general issue by statute) the grounds of suspicion *must* be alleged in a plea to an action for the arrest; *Davis v. Russell*, 5 Bingham, 354; *Hailes v. Marks*, 7 Hurlstone & Norman, 56: and the reason is that, whether there were reasonable grounds of suspicion is a mixed question of law and fact; *West v. Baxendale*, 9 Common Bench, 141; and as where the grounds of suspicion are alleged in a plea, they must be proved on the trial; so where the general issue is given by statute, they must be proved on the trial; *Davis v. Russell*, *ubi supra*; and so in a criminal case like the present the grounds of suspicion must be proved, in order that the jury may determine whether in fact the grounds existed, and that the court may decide, if they did exist, whether they were reasonable grounds. If a witness were asked whether he had reasonable grounds of suspicion, the question would clearly be erroneous; as the answer would be a conclusion of law and fact. In these cases 'the question is on what grounds and motives the constable acted at the time,' per Burrough J. in *Davis v. Russell*. Now it cannot be doubted that the bad character of the party may form one ground of suspicion: and the ordinary rule applicable to the receipt of evidence of character is that general evidence is alone admissible; but in a case like the present, as both the general character of the party and particular facts might operate on the mind of the constable, it is plain that evidence of both would be admissible. It is obvious too that the general character of the party might be infamous, and yet the constable might himself know nothing of such general character except from what he had been told by others; to limit the question therefore to what the constable knew of the prisoner would be to exclude all evidence of his general character, which possibly formed a most material ground of suspicion. Lastly, evidence of the character or conduct of a prisoner is always admissible in order to show that the acts of others, especially of officers of justice, are lawful; which is a totally different issue from that raised as to the guilt of the prisoner, though that issue may depend upon the other." 3 Russell on Crimes, 304 note. 4th ed.

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### REX v. TOLFREE.<sup>1</sup>

Hilary Term 1830.

#### *Adulterer — Taking Goods by the Delivery of Adulteress.*

An adulterer stole jointly with the wife, money and plate, wearing apparel and goods, of the property of the husband. *Held*, that he was guilty of larceny.

THE prisoner was tried and convicted before Mr. Justice GASELEE at the Summer Assizes for the county of Surry, 1829, on an indictment which charged him with stealing 150*l.* in money and plate, wearing apparel and goods to the amount of 70*l.* the

<sup>1</sup> 1 Moody C. C. 243. Overruling *Rex v. Clark*, 1 Moody C. C. 376 note

property of Peter Stocker, in his dwelling-house in the parish of Saint Mary, Lambeth, on the 11th July.

The prisoner and his wife had lodged about a year and half at the prosecutor's and had the front room on the first floor. About half past ten on the night of the robbery (Saturday 11th July) prosecutor went out, leaving his wife and a little child and the prisoner in his house. He left his wife in the care of the house and property, and she had the keys of the drawers in which the money was. On his return a little before twelve he found a person in charge of his house, but his wife, child, the prisoner, and the property stated in the indictment, were gone.

During the absence of the prosecutor, the prisoner called a hackney coach, and put into it a great many boxes, &c. which, with the prosecutor's child, he took and left at a house in Camberwell, to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and had hired lodgings. He left the child and property there, and said he should go for his wife and bring her in a quarter of an hour. He accordingly went to the Surry Theatre, whither the prosecutor's wife had gone a few minutes before, and took her with him to Camberwell, where they lived together till the prisoner was apprehended. The wife took a small basket with her.

The prosecutor's wife was called for the prisoner, and swore there was none of the property but what she had herself taken, or given to the prisoner to take.

The learned judge had begun to sum up, and was telling the jury that if they believed the prosecutor's wife, the prisoner must be acquitted, when the following passage from 1 Russell, 19, was shown to him.

"But it should be observed that if the wife steal the goods of the husband and deliver them to B., who knowing it, carries them away, B. being the adulterer of the wife, this according to a very good opinion would be felony in B., for in such case no consent of the husband can be presumed." Dalton, cap. 104, pl. 268, 269; new edition, c. 157, p. 504.

Upon the authority of this passage the learned judge directed the jury to find the prisoner guilty, and respited the sentence to take the opinion of the Judges.

The jury found that the prisoner stole the property jointly with the wife.

At a meeting of all the Judges in Hilary term 1830, this case was argued by

*Clarkson*, for the prisoner. There is no felony proved on which this conviction can be supported. The first proposition to be established is, that if a wife take the goods of her husband and deliver them to a stranger, this is no felony in the stranger; and the reason is, the identity of husband and wife, and the kind of interest she has in the husband's goods; which, as regards the person so receiving the goods, makes his taking not the taking of the goods of a stranger. Hawkins P. C. lib. 1, c. 33, § 32. "It is certain that a *feme covert* may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's, because a husband and wife are considered but as one person in law; and the husband by endowing his wife at the marriage, with all his worldly goods, gives her a kind of interest in them; for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife, as he may by taking away the wife by force and against her will together with the goods of the husband." And the same is laid down, 1 Hale P. C. 513, 514, and 21 Hen. VI. Fitzherbert, *Coronne*, 455, 3 Institute, 110, are given as authorities, and the reason there given is, that it is quasi by consent of the husband. The passage referred to in 3 Institute, 110, is: "The wife cannot steal the goods of her husband, for they be not the goods of another, for the husband and wife are one person in law, *duæ animæ in carne una*." But it is said that the prisoner here is not in the same situation, because he is an adulterer. As to that, the facts stated do not show any previous adultery; but assuming that he was an adulterer before and at the time of the taking, it then becomes necessary to examine the authority on which the position cited by the learned judge from 1 Russell rests, and it will be found to depend on Dalton, c. 154, where after laying down the same law as already contended for, it is said: "If a married woman shall deliver to her adulterer her husband's goods, this is felony in the adulterer. Lecture Mr. Cook." I have not been able to find what this reference means, or who Mr. Cook was. It is true that in 1 Hale P. C. 516, this opinion of Dalton is referred to, but merely as his opinion. In Dalton it is stated not to be felony when the wife delivers to a stranger; and the authorities referred to in the margin of Dalton (Fitzherbert, *Coronne*, 455, Br. *Coronne*, 142, Stam. 27) all support the position

contended for. But it is said in Dalton, that, "if any man take another man's wife with her husband's goods against the husband's will, this also is felony." Now the true principle from the authorities already cited is not that it is against the husband's will, because that is in truth so in the ordinary case when the wife consents; but that it is done with the wife's consent, and therefore is not felony. The authorities in the margin of Dalton are Br. Coronne, 77, Stam. 27, and upon reference to the originals, it appears that they all go on the non-consent of the wife, she being taken with the goods against her will.

BAYLEY J. Supposing they both take together, and it is a joint act, is it not felony then?

LORD TENTERDEN. That is the fact as found here, that the prisoner stole the goods jointly with the wife.

Then as she has a kind of interest in and authority over the husband's goods, as she consents and gives permission, even then the man cannot be said to take the goods of a stranger. It clearly is not felony in her; and therefore as the act of taking is joint it cannot be so in him. If the wife has such an interest in the husband's goods, her presence makes it impossible to be felony; because the taking must be against her consent, as well as against the husband's. Harrison's Case, 1 Leach C. C. 47, shows that the taking must be against the wife's consent: so also 2 East P. C. 558, and in 1 Hale P. C. 514. But if a man take away another man's wife against her will, cum bonis viri, this is felony by the statute of Westminster, c. 34. But if it be by consent of the wife, though against the consent of the husband, it seems to be no felony but a trespass; for it cannot be a felony in the man unless it be a felony in the woman who consented to it. 13 Ass. 6. The non-application of the doctrine hitherto shows, that taking away the goods of the husband with the consent of the wife cannot be felony; as in the frequent transactions of life, where criminality of another description is the object between the stranger and the wife, it cannot but happen that some property of the husband's is taken away. If the doctrine suggested be law, men so engaged, however criminal in other respects, would incur the penalties to which they have certainly hitherto not been thought amenable.

Upon the ground therefore that no previous adultery is shown, or, if so, that the consent of the wife makes it impossible that the prisoner could be guilty of felony in a joint taking with her, it is submitted that the conviction is illegal.

The Judges held that this was larceny, for though the wife consented it must be considered that it was done *invito domino* and the conviction was affirmed.

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REGINA v. FEATHERSTONE.<sup>1</sup>

June 3, 1854.

*Adulterer — Taking Goods by the Delivery of Adulteress.*

The prisoner was charged with stealing twenty-two sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bed-room thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room, "It's all right, come on." The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house, where they slept together. When taken into custody, the prisoner had twenty-two sovereigns on him. The jury found the prisoner guilty on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband. *Held*, that the conviction was right.

THE prisoner, George Featherstone, was tried at the Spring Assizes 1854, holden at Worcester. The indictment charged him with stealing twenty-two sovereigns and some wearing apparel.

It appeared that the prosecutor's wife had taken from the prosecutor's bedroom thirty-five sovereigns and some articles of clothing, and that when she left the house she called to the prisoner, who was in a lower room with the prosecutor and other persons, and said: "George, it's all right; come on." Prisoner left in a few minutes after. The prisoner and the wife were afterwards seen together at various places, and eventually were traced to a public house, where they passed the night together. When taken into custody, the prisoner had twenty-two sovereigns upon him.

The jury found the prisoner guilty, stating that they did so "on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband."

Whereupon the judge, the late Mr. Justice Talfourd, respited the judgment, admitted the prisoner to bail, and reserved for the opinion of the Court of Criminal Appeal the question, whether a

<sup>1</sup> Dearsly C. C. 369; 6 Cox C. C. 376.

delivery of the husband's goods by the wife to the adulterer, with knowledge by him that she took them without the husband's authority, was sufficient to maintain the indictment for felony against him.

WILLIAM WIGHTMAN.

The case was considered June 3, 1854, by Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., MARTIN B. and CROWDER J.

No counsel appeared on either side.

The Court retired to consider their judgment.

LORD CAMPBELL C. J. We are of opinion that this conviction is right. The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases. The prisoner was her accomplice, and the jury find that he assisted her, and took the sovereigns, knowing that she had taken them without the husband's consent. It is said in Russell on Crimes, vol. 1, p. 23, 3d ed., that a stranger cannot commit larceny of the husband's goods by the delivery of the wife; but a distinction is pointed out where he is her adulterer, for which Dalton's Justice, ch. 157, p. 353, is cited. "But if the wife steal the goods of her husband, and deliver them to B., who knowing it carries them away, B. *being the adulterer of the wife*, this according to a very good opinion, would be felony in B.; for in such case no consent of the husband can be presumed." That case is identical with the present. The prisoner knew that it was without the consent of the husband. We think the conviction was clearly right.

ALDERSON B. An adulterer cannot be allowed to set up as a defence a delivery by the wife, when he knows the circumstances under which the goods were taken by the wife from the husband.

The other learned Judges concurred. *Conviction affirmed.*

Rex v. Tolfree is the leading case on this branch of the law of larceny. No counsel appears to have argued on the part of the Crown; and, from the very unsatisfactory system of reporting the Crown Cases Reserved, which then prevailed, we are only informed that "The Judges held that this was larceny; for, though the wife consented, it must be considered that it was done *invito domino*."



*Regina v. Featherstone* is an important case, as showing more clearly than any other the principle upon which the law proceeds: *When the wife becomes an adulteress, she thereby determines her quality of wife; and her property in her husband's goods ceases.* It has been well said that she thus assumes the position of a mere stranger, and can no longer invoke the protection of that quality which she has herself determined. The passage from Dalton cited by Lord Campbell is the foundation of this principle.

This subject will be discussed under the following heads: —

I. Where an adulterer takes goods jointly with the wife, he may be guilty of larceny.

II. An intention to commit adultery is sufficient.

III. In *Regina v. Deer, Leigh & Cave* C. C. 240, an adulterer was convicted of receiving.

IV. Where the wife alone takes property to her adulterer's lodgings, he cannot be convicted on mere evidence that the property is in his lodgings.

V. An adulterer is not guilty of larceny if he merely assist the adulteress in carrying away her necessary wearing apparel.

VI. Where adultery is neither committed nor intended, a person is not guilty in aiding a wife in taking away her husband's goods.

VII. Conviction of the wife.

I. *Where an adulterer takes goods jointly with the wife, he may be guilty of larceny.*

The *People v. Schuyler*, 6 Cowen, 572 (1827), is almost identical with *Regina v. Featherstone*, and was decided on the authority of the passage cited by Lord Campbell from Dalton. The evidence was, that the prisoner eloped with L.'s wife in the night, carrying away with him certain household furniture or goods of L. secretly and unknown to L. The prisoner and L.'s wife having agreed to elope with an intention that she should live with him as his wife, she told him of her intention to take the furniture. He at first declined taking any thing beside her wearing apparel; and said he would have nothing to do with the goods; but at her request, she saying that the goods were her own, he assisted in placing them in a wagon when they started; and also assisted in carrying some of them out of the house. They afterwards lived together as man and wife in the State of New Jersey. The goods were taken with the intention of converting them to the use of the prisoner and L.'s wife; and afterwards, up to the time of the trial, under the control of the wife at her father's.

SAVAGE C. J., after citing the passage from Dalton, concludes a well-considered judgment: "Here the adulterer did more than merely receive stolen goods from the wife. He assisted in stealing them, carrying some of them out of the house. He had no reason to presume the husband's consent to such a taking; and is plainly guilty of felony."

In *Regina v. Thompson*, 1 Denison C. C. 549; 4 Cox C. C. 191; *Temple & Mew* C. C. 294, the defendant was indicted and found guilty of stealing nine gowns, two brass candlesticks, one coffee-pot, one dining-table, two aprons, two pair of boots, two pair of shoes, four shawls, two pair of stockings, two sheets, and two silk handkerchiefs, the property of T. E. The evidence showed that

the prisoner, who worked and lodged at the house of the prosecutor, went away on the 4th of January 1848, with the prosecutor's wife. That they went to Birmingham, where they lived together as man and wife for more than a year. That they took with them from the prosecutor's house a box belonging to the prosecutor, containing the wife's wearing apparel, and also a coffee-pot and two candlesticks, the property of the prosecutor. The wife of the prosecutor was examined, and gave very contradictory evidence as to what passed at the time of leaving the prosecutor's house. She stated however, as part of her evidence, that the prisoner assisted in placing the things in the box, and in removing the box from the cellar to the cart in which it was taken away. It appeared further, that on the parties arriving in Birmingham, the box was opened, and the prisoner saw its contents. That the coffee-pot and candlesticks were used by them in their houses at Birmingham, and that these articles were afterwards sold by the prosecutor's wife. That the prisoner there pledged some articles of the wearing apparel, and applied the money for his own purposes.

The chairman, in summing up, directed the jury to find the prisoner guilty, if they came to the one or the other of the following conclusions — either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods; or, secondly, that not being a party to the original taking or removal, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury found the prisoner guilty, adding, that they did so on the ground that there was *a joint taking by the prisoner and the prosecutor's wife*. The counsel for the prisoner applied to the court to reserve the question, and the cases of *Regina v. Clark*, 1 Moody C. C. 376 note, and *Regina v. Rosenberg*, 1 Carrington & Kirwan, 233, were cited. The court accordingly requested the opinion of the Judges on the question, whether the case was properly left to the jury, and the conviction good. On the 27th April 1850, the case was considered before the Court of Criminal Appeal, consisting of Lord Campbell C. J., Parke B., Alderson B., Cresswell J. and Erle J., who were unanimously of opinion that the conviction was right.

The marginal note in *Regina v. Thompson*, as reported by Denison, is as follows: "A. assists the wife of B. to take B.'s goods, which were afterwards used by them in common, without the consent of B.; held, evidence to warrant a conviction against A. of larceny;" to which the reporter has appended the following note: "The editor feels some doubt whether the precise effect of the judgment is given in the marginal note. If the judgment is to be understood to sanction the opinion of the jury that the joint taking, per se, constituted larceny, the marginal note is correct. But if the element of adultery, though apparently deemed immaterial by the jury, was considered essential by the court, the marginal note should be as follows: 'A., who was then living, or intending to live, in adultery with the wife of B.,' assists her in taking the goods of B. &c. as above. This would seem to be the more correct view of the case, inasmuch as the mere taking, jointly with the wife, would not *prima facie* be a trespass, since a wife is presumed to be the agent of her husband. Nor would the subsequent use by A., jointly with the husband, alter the case. But as soon as the element of adultery, actual or intended, enters into the case, the presumption of agency is rebutted, and the taking by A. becomes a trespass,

which, if felonious, is a larceny, and the wife would be a co-trespasser, and criminally liable, were it not for the legal theory which identifies her with her husband, and so prevents a taking of his goods by her from being larceny."

II. *An intention to commit adultery is sufficient.*

Where the prosecutor and his wife were on bad terms, and she arranged with the prisoner to elope with him and live together as man and wife, and the prisoner desired her to bring all the money she could, and to get the money and boxes of clothes ready by a particular night, when he would come for them and take her away; and she put £17 into the boxes, which already contained her clothes, two watches, some silk handkerchiefs, and about £4, and sat up after her husband had gone to bed till the prisoner came, took him into the room where her husband was asleep, and he took the boxes away, and, if her husband had remained asleep, she would have gone off with the prisoner, but, as her husband awoke, she was obliged to stay. It did not appear that any adultery had been committed. The boxes were locked by the wife, and were found in that state in the possession of the prisoner, and were unlocked with keys produced by the wife. Coleridge J. directed the jury that, if the prisoner took any of the husband's property, there then being an intention to commit adultery with the wife, he was guilty of larceny; and that, having told the wife to bring all the money that she could, it was for them to consider whether he did not intend to steal the property taken away, although he might not, at the time of the taking, know exactly of what that property consisted. *Regina v. Tollett, Carrington & Marshman*, 112.

Where the prisoner lodged at the prosecutor's house, and knew that he would have to go out very early in the morning, and engaged a porter to be near the house at seven o'clock with his cart; the prisoner and the wife of the prosecutor were then jointly engaged in the house in packing up the articles alleged to be stolen in boxes, and when so packed the prisoner brought the boxes out, and they were put in the cart and driven to the station, the prisoner, the wife, and her three children accompanying them, and all went by the train to Leeds. A fortnight afterwards the prisoner and the wife were found living together at Leeds, in a house which she had taken in her own name, and all the property taken was found there. The wife was called as witness for the prisoner, and swore that they neither had committed adultery, nor gone away for that purpose. The jury were told that if they were satisfied that the prisoner and the wife, when they took the property, went away for the purpose of having adulterous intercourse, and had afterwards effected that purpose, they ought to convict; but that if they believed the wife that they did not go away with any such purpose, and had never committed adultery, they ought to acquit. The jury found the prisoner guilty of larceny, and the conviction was affirmed. *Regina v. Berry*, Bell C. C. 95.

Where the prosecutor's wife, taking with her articles of her wearing apparel, eloped with the prisoner, the clothes were found in a trunk belonging to the prisoner, of which the wife had the key, which the prisoner had given her, and she said she put them there; the name of the wife was changed, and a passage ticket taken out in the joint name of Walker. Lefroy C. J. left the case to the jury, and the prisoner was convicted. *Regina v. Glassie*, 7 Cox, 1. This

case is extremely ill reported, and very little reliance can be placed on it. The facts above stated are culled from the different parts of the report.

*Regina v. Mutters*, 10 Cox C. C. 50, and *Leigh & Cave C. C. 511* (1865), is the latest crown case reserved. On an indictment for larceny, it appeared that the prisoner was a servant of the prosecutor, and that he was seen to bring a box out of the house of his master on the 28th of July, and that on the night of that day the prisoner and the prosecutor's wife occupied the same bedroom at Bath, and that in that room a police constable found them together, and charged the prisoner with stealing spoons and a watch of the prosecutor. He said: "I've not stolen any thing; what I have taken away is with her consent" (nodding to the wife). She said: "Yes; I told him to get a fly, and take the boxes." The constable pointed out a box, and said: "That is the prosecutor's." She said: "Yes, that is the only thing which I have got of his." The constable took the watch from the prisoner's person. The constable examined a box which the prisoner admitted to be his, and found on the top several articles of female apparel, and under these some silver spoons and sugar tongs of the prosecutor. The prisoner said, "I did not know the silver was there; the watch is Mrs. F.'s; I got it from her." The wife proved that she ordered the prisoner to get a fly and take away the boxes, and that the prisoner was not there when she was packing. He did not know of her putting in the spoons or sugar tongs. It was objected that the charge against the prisoner could not be maintained, as he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband; the jury were directed that if the prisoner and the wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty; and, upon a point so raised, *Erle C. J.*, after argument for the prisoner, said: "Upon these facts the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed." *Regina v. Mutters*, 10 Cox C. C. 50; *Leigh & Cave C. C. 511*.

### III. In *Regina v. Deer*, *Leigh & Cave C. C. 240*, an adulterer was convicted of receiving.

In this case the prisoner, having lodged in the prosecutor's house about a year, left, but there was no evidence as to the time or manner of his leaving. The next day the prosecutor's wife left, with only a small bundle under her arm. The prisoner was apprehended on board a vessel bound to Quebec, in company with the wife, who was passing under the name of Mrs. Deer, and the prisoner had tickets for Quebec, in the names of Mr. and Mrs. Deer. A great quantity of the prosecutor's property, very much more than could have been comprised in the wife's bundle, and not confined to the wife's clothes, was found in the prisoner's cabin and on his person, on the 10th of April, and it had been missed on the evening of the 9th of that month. There was no other evidence who had taken the articles from the house. The jury found the prisoner guilty of receiving, knowing the goods to have been stolen. No counsel appeared on either side.

**POLLOCK C. B.** "In this case the prisoner was lodging in the house of the

prosecutor, and disappeared under circumstances which are not disclosed. The prosecutor's wife afterwards left her home; and the prisoner is subsequently found with her and in possession of a large quantity of the prosecutor's property, some part being actually upon his person. We are of opinion that there is some evidence to support the conviction."

It will be observed that no grounds are given for this decision. The language of the court is very guarded: "We are of opinion that there is *some* evidence," &c. Mr. Greaves remarks: "As the only possible inferences from the facts are either that the prisoner took the goods, or joined with the wife in taking them, or that the wife took them or part of them, and afterwards delivered them to the prisoner, it is clear that he was guilty of stealing and not of receiving, and therefore this decision is wrong." 1 Russell on Crimes, 44 note. 4th ed. It may well be doubted whether it can be sustained on any ground.

IV. *Where the wife alone takes property to her adulterer's lodgings he cannot be convicted on mere evidence that the property is in his lodgings.*

Where the prisoner does not take away the goods in company with the wife, but she brings them to his lodgings, and there commits adultery with him, and no distinct possession of the goods on the part of the prisoner is shown, he cannot be convicted. The prisoner induced the prosecutor's wife to go to his lodgings, and she took with her a quantity of goods, not consisting of female apparel, or of articles exclusively for female use, and they were put into the prisoner's lodgings, and the prisoner and the prosecutor's wife slept together there as man and wife; but the goods could not be traced to the individual possession of the prisoner by any particular act of his, but it could only be shown that they were found at his lodgings, some of them in the room in which he and the prosecutor's wife slept together; and Lord Denman C. J. and Parke B. concurred in thinking that there was not enough to convict the prisoner. *Regina v. Rosenberg*, 1 Carrington & Kirwan, 233. If any separate act of possession had been shown the point would have been reserved.

V. *An adulterer is not guilty of larceny if he merely assist the adulteress in carrying away her necessary wearing apparel.*

Upon an indictment for stealing a bonnet, books, and goloshes, it appeared that the prisoner, being a lodger in the prosecutor's house, agreed with his wife that they should go away and live together in adultery. He went away leaving the husband and wife together; then the husband went out to work, and then the wife went after the prisoner. They were overtaken on the road in company together, and he was carrying a bandbox containing goloshes and boots, the wearing apparel of the wife of the prosecutor, and so in law his property. The Judges were all of opinion that, as the prisoner was only assisting in carrying away the necessary wearing apparel of the wife, the conviction could not be sustained. *Regina v. Fitch*, Dearsly & Bell C. C. 187.

In *Regina v. Tollett*, Carrington & Marshman, 112, Carrington contended that if a wife eloped with an adulterer, it would be no larceny in the adulterer to assist in carrying away her clothes; but Coleridge J. told the jury that "if she elopes with an adulterer who takes her clothes with them, it is larceny to steal her clothes, which are her husband's property, just as much as it would be a

larceny to steal her husband's wearing apparel, or any thing else that was his property. However the evidence in this case goes further than that," &c. This opinion, which it will be observed was not necessary to the decision of the case, was not cited in *Regina v. Fitch*, ubi supra, but Coleridge J. concurred in that decision which virtually overrules his direction in *Regina v. Tollett*; "for where the necessary wearing apparel alone is taken, the necessity for which it is taken furnishes the motive, and negatives the animus furandi." 1 Russell on Crimes, 45 note. 4th ed.

VI. *Where adultery is neither committed nor intended, a person is not guilty in aiding a wife in taking away her husband's goods.*

In *Regina v. Avery*, Bell C. C. 150 (1859), which was an indictment for larceny, it appeared that one prisoner was uncle and the other cousin of the prosecutor's wife, and that on the nights of the 7th and 10th of February they went to the prosecutor's house, without his knowledge, after he had gone to bed. The wife admitted them on each occasion. The first night they packed and took away, in the wife's presence, and with her consent, a box containing property of the prosecutor, and on the second night they took, in her presence and with her consent, a carpet and cooking-pots. On the 11th, after the prosecutor had gone to his work, the cousin went to the house, and with the wife's consent carried away a bed, and placed it in a granary at a short distance, requesting the person who gave him permission to do so not to inform the prosecutor. The cousin then returned to the house, and went away with the wife, taking with him a basket containing property of the prosecutor. The wife left without her husband's knowledge or assent, and without the intention of returning; they went together to the house of the uncle. The prosecutor and a constable went thither that evening, and the uncle denied he had any property of the prosecutor's; the house was searched, and a milk-jug and several other articles of the prosecutor's were found in a bedroom; and boxes and other articles of the prosecutor's were found in an adjoining house. The boxes had upon them the address, "Henry Avery, to be left at the Rose Inn, Folkstone." There was no evidence that the wife remained at the uncle's house, or that she had committed adultery with either prisoner, or intended to do so. The jury found that the prisoners took the goods without the knowledge or consent of the husband, and with the intention to deprive him absolutely of his property in them, and found the prisoners guilty.

COCKBURN C. J. delivered the opinion. "The conviction in this case cannot be sustained. No adultery is shown to have taken place between either of the prisoners and the prosecutor's wife, nor is it found that any was intended. The goods were taken in the presence, with the privity and consent of the wife, when she was abandoning her husband's dwelling. It is not necessary to lay it down as law that, supposing a stranger stole the goods of a husband, and the wife was privy to it and consenting, such privity and consent on the part of the wife would, if there was animus furandi in the stranger, exonerate him from what would otherwise be larceny.<sup>1</sup> In deciding that this conviction should be quashed, it is not necessary to adopt that doctrine; but, on the other hand, we

<sup>1</sup> This point does not appear to have been yet determined.

take it to be clear that a wife cannot be guilty of larceny in simply taking the goods of her husband; and if a stranger do no more than merely assist her in the taking, inasmuch as the wife, as principal, cannot be guilty of larceny, the stranger as accessory cannot be guilty. In this case it was not left to the jury to say whether the prisoners were acting as principals when the act was done, or whether the wife was the principal and the prisoner merely aiding and assisting her. That finding might have raised the question; but, in its absence, we must assume that state of the case which is most favorable to the prisoners, and the conviction must be quashed."

#### VII. *Conviction of the wife.*

A question might be raised whether, in such cases as that of *Rex v. Tolfree* or *Regina v. Tollett*, where the adulterer was convicted, the wife also could have been found guilty of larceny. The passage from Dalton refers only to the adulterer; and Hale's argument, that it is no felony in the man, proceeds on the assumption that it is no felony in the woman. 1 Hale P. C. 514. So Mr. Clarkson, arguing in *Rex v. Tolfree*, says: "It clearly is not felony in her." And from Lord Campbell's qualification of the general rule, that when the wife becomes an adulteress she thereby determines her quality of wife, and her property in her husband's goods ceases, it would seem to follow that she thus assumes the position of a mere stranger, and can no longer invoke the protection of that quality which she has herself determined. And in *Regina v. Avery, Cockburn C. J.* says: "We take it to be clear that a wife cannot be guilty of larceny in simply taking the goods of her husband; and, if a stranger do no more than merely assist her in the taking, *inasmuch as the wife, as principal, cannot be guilty of larceny, the stranger, as accessory, cannot be guilty.*" "Surely, e converso, if the stranger merely assists the wife in the taking *animo adulterii*, and is therefore guilty of larceny, it can only be on the principle that the wife is equally guilty. In *Regina v. Deer*, ante p. 367, the verdict, that the adulterer was guilty of receiving, implied the existence of a principal felon who was guilty of stealing. Now, upon the evidence, this could be none other than the wife; and therefore this decision also would seem to countenance the opinion that the wife is liable to be convicted equally with her adulterer, when she takes part in removing her husband's property. The point however is not of much practical importance, as the effect of including the wife in the indictment would be to exclude the evidence of the husband, which in most cases would entail the failure of the prosecution." Note to *Regina v. Mutters*, Leigh & Cave C. C. p. 516, where the law on this subject is lucidly stated.

COMMONWEALTH v. UPRICHARD.<sup>1</sup>

March Term 1855.

*Larceny—Property stolen in a Foreign Country and brought into this Commonwealth.*

The bringing into this commonwealth, by the thief, of goods stolen in one of the British Provinces, is not larceny in this commonwealth.

SHAW C. J. The defendant, together with Thomas Carey, was indicted in the municipal court for larceny, in stealing a large number of sovereigns and other gold and silver coins, properly enumerated and described. The indictment charges that the two defendants, at Boston, on the 27th of July 1854, the gold pieces and other coins, the property of George D. Twinning, in his possession then and there being, feloniously did steal, take and carry away.

The evidence failing to prove a joint possession of the stolen property in this commonwealth, the prosecuting attorney submitted to a verdict in favor of Carey, and proceeded against Uprichard; and afterwards a new indictment was found by the same grand jury, so that each was tried as upon a separate indictment for the goods found in his separate possession. See *Rex v. Barnett*, reported in 2 Russell on Crimes (7th Amer. ed.) 117.

The defendant Uprichard was convicted upon the evidence and under the instructions of the court; and the judge finding the case to involve important questions of law, with the consent of the defendant, and conformably to the provision of law in that behalf, reported the same for the consideration of this court.

By the report it appears that Uprichard and Carey were soldiers in the service of the Queen of England, at Sidney, in the Province of Nova Scotia; that the coins alleged to be stolen were partly the property of George D. Twinning, a deputy commissary at the military station in Sidney, and partly the property of the Queen, in the care and control of said commissary; that the property was taken from the military chest, without right, said chest being in the possession of said Twinning; that the defendants deserted at about the same time, with certain of said coins in their possession, and

<sup>1</sup> 3 Gray, 434.



were found in this State, each having a part of the stolen property in his possession.

Upon the evidence offered, the counsel for the defendants asked the court to rule that the indictment could not be supported by the evidence: 1st. Because the law in force at Sidney was not proved; 2d. Because said property, if stolen at all, was stolen at Sidney, out of the State of Massachusetts, and out of the United States; and the bringing of said stolen property into, and the possession of it in Boston, would not constitute the crime of larceny in this commonwealth, and would not support the allegation that the coins and other property were feloniously stolen in this county; and therefore the court had no jurisdiction of the offence. But the court overruled the motion, and Uprichard was convicted.

This is briefly stated; but we understand, and so it has been understood in the argument, that the court instructed the jury that if the property was stolen by the defendant at Sidney, in Nova Scotia, one of the colonies and possessions of the Queen of Great Britain, and the property, so stolen, and continuing in the possession of the defendant, was brought by him into this commonwealth, and into this county, the indictment charging him with stealing them, being in possession of the owner, in this county, was legally sustained, and that the defendant could be convicted and punished for this offence by our laws.

We do not perceive that it makes any difference whether the property, stolen in a foreign country, was the property of the sovereign, or of a subject. Indeed, it seems that a part of it was of the one character, and a part of the other. Nor does it make any difference that the defendant deserted the military service at the same time that he plundered the property of his sovereign.

This case presents an extremely interesting and important question; and the precise question, we think, comes up now for the first time in this commonwealth. The main argument in support of the conviction is founded on the well known rule and practice of the common law, that all trials must be had in the county where the offence is committed; that when property has been proved to have been stolen in one county, and the thief is found, with the stolen property in his possession, in another county, he may be tried in either county. It proceeds on the legal assumption that when the property has been feloniously taken, every act of removal or change of possession by the thief may be regarded as a new

taking and asportation; and as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession, and so it may be said, at each removal, to be taken from his possession. 2 Russell on Crimes (7th Amer. ed.) 115, 116. But in principle these cases are not strictly analogous. If the offence is committed anywhere within the realm of England, in whatever county, the same law is violated, the same punishment is due, the rules of evidence and of law governing every step of the proceedings are the same, and it is a mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same. A conviction or acquittal in any one county is a bar to any indictment in every other; so that the question as to the place of trial is comparatively immaterial. But even in England, a crime, being an offence against the laws of England, committed on the high seas, and not within the body of any county, cannot be tried in any county, but only in the courts of admiralty jurisdiction; and a fortiori an offence committed in a foreign country, by persons not there amenable to the laws of England, could not, upon principle, be tried and punished in England; and the rule, that when goods are feloniously taken and brought into a county, it may be charged and tried as an offence in that county, did not anciently extend to goods stolen in any place not within the common-law jurisdiction. 3 Inst. 113. 1 Hawkins P. C. ch. 33, § 52. And a similar exception took place in regard to goods stolen in Scotland or Ireland, and brought into England, until altered by Sts. 13 Geo. III. ch. 31, § 4, and 7 & 8 Geo. IV. ch. 29, § 76. *Rex v. Anderson*, 2 East P. C. 772. *Rex v. Prowes*, 1 Moody C. C. 349. And the effect of these English statutes was, that where goods were stolen in one part of the United Kingdom, and carried into another by the thief, or received by one knowing them so to have been stolen, the thief or receiver might be indicted and tried in that part of the United Kingdom where the goods were found. This was within the principle, that, in whatever part of the same government the offence was first committed, the same law was violated, the same rule and measure of punishment attached, and with the same consequences, in whatever part of the territory of the same government the trial was had. But, even under the English statutes, one who steals goods in Jersey, and carries them into England, cannot be tried there for larceny, Jersey not being in the

United Kingdom within the meaning of those statutes. *Rex v. Prowes*, 1 Moody C. C. 349. See also *Regina v. Madge*, 9 Carrington & Payne, 29.

Such being the rule of the English law, we are next to inquire how it stands in this State and in the other States of the Union. In some of the States it is held that, according to the English rule in respect to counties, the carrying of stolen goods by the thief into another State, from the one in which they were stolen, is a new caption and a new asportation in the State into which they are thus carried. In other States a different rule is held.

In Pennsylvania, it has been held that such carrying of stolen goods by the thief into another State, and possession of them there, is not larceny in the latter. *Simmons v. Commonwealth*, 5 Binney, 617. So in North Carolina and Tennessee. *The State v. Brown*, 1 Haywood, 100. *Simpson v. The State*, 4 Humphreys, 456. And in New York. *The People v. Gardner*, 2 Johnson, 477. *The People v. Schenck*, 2 Johnson, 479.

But a different rule has been adopted in Maryland, *Cummings v. The State*, 1 Harris & Johnson, 340; in Ohio, *Hamilton v. The State*, 11 Ohio, 435; in Vermont, *The State v. Mockridge*, cited in 11 Vermont, 654; and in Connecticut, *The State v. Ellis*, 3 Connecticut, 185.

The same rule also that such bringing in of stolen goods is larceny, has been adopted in this commonwealth, in two cases next to be cited.

It seems to have been considered, that although the several States are, in their administration of criminal law, regarded as sovereign and independent, yet, as they were originally English colonies, and acknowledged their subjection to the common law of England, and claimed its privileges, and all equally derived their principles of criminal jurisprudence mainly from that source, and as they had been, both before and since the Revolution, closely united for many purposes, there was an analogy, more or less strict, between the relations of these States to each other, and those of counties under the same government; and therefore that the same rule might be safely adopted.

The first was the case of *Commonwealth v. Collins*, 1 Massachusetts, 116. The goods were stolen in Rhode Island and brought into Massachusetts. The court instructed the jury, that stealing goods in one State and carrying them into another State was simi-

lar to stealing in one county and carrying them into another, and was larceny in both; and therefore, if the facts were proved, the jury would find the defendant guilty of stealing in Massachusetts. But this point was not argued.

In *Commonwealth v. Andrews*, 2 Massachusetts, 14, the defendant was convicted of receiving stolen goods, which had been stolen in New Hampshire and brought into this commonwealth; and the court held that the stealing of them was larceny in this commonwealth, and rendered the defendant answerable for receiving the goods, knowing them to be stolen. And, in the same case, Dana C. J. mentioned the case of Paul Lord, tried in York in 1792, before the publication of reports, in which it was held that stealing goods in another State and bringing them into this were larceny in this. And that learned chief justice thought that many more cases had been determined on the same grounds. Some of the Judges, however, in this case, were of opinion, upon the facts stated, that there had been a second taking of the goods in this State, so as to make it actual stealing in Massachusetts.

It has then been argued that the same rule ought to apply to foreign governments as to the several States of the Union, because in their respective jurisdictions, and in the laws which regulate their internal police, these are as much foreign to each other as each State is to foreign governments. Perhaps, if it were a new question in this commonwealth, this argument might have some force in leading to another decision in regard to the several American States. But supposing it to be established by these authorities, as a rule of law in this commonwealth, that goods stolen in another State, and brought by the thief into this State, are to be regarded technically as goods stolen in this commonwealth, we think this forms no sufficient ground for carrying the rule further, and applying it to goods stolen in a foreign territory, under the jurisdiction of an independent government, between which and our own there is no other relation than that effected by the laws of nations. Laws to punish crimes are essentially local, and limited to the boundaries of the State prescribing them. Indeed, this case and the cases cited proceed on the ground that the goods were actually stolen in this State. The commission of the crime in Nova Scotia was not a violation of our law, and did not subject the offender to any punishment prescribed by our law. This indictment proceeds on that ground, and alleges the crime of larceny to have

been committed in violation of the laws of this commonwealth, and within the body of this county. It is only by assuming that bringing stolen goods from a foreign country into this State makes the act larceny here, that this allegation can be sustained; but this involves the necessity of going to the law in force in Nova Scotia to ascertain whether the act done there was felonious, and consequently whether the goods were stolen; so that it is by the combined operation of the force of both laws that it is made felony here. Were it any other offence than that of larceny, which gives an ambulatory character to the offence, by the movable character and the guilty possession of the goods stolen, there could be no doubt of the law, and no plausible pretence that our law had been violated, or the party amenable to penalties created by it. Hence the necessity, in the Constitution of the United States, establishing the Union, for a fundamental clause providing for the mutual surrender of fugitives from justice, and also for treaties of extradition providing for the mutual surrender by our government of persons charged with crimes in another.

We have not overlooked the case of *The State v. Bartlett*, 11 Vermont, 650, in which it was held, that where oxen were stolen in Canada, and by the thief brought into Vermont, the thief might be indicted and convicted, on the ground that such had been the practice. We think the case is not supported by the current of authorities, and is contrary to principle.

If this were a mere question of jurisdiction, of the place where a party should be tried, it would be substantially a technical question; but it stands on very different grounds. Here the question is one of principle, whether the defendants have violated our law. It is said that they commit a new theft, by the possession of stolen goods in our jurisdiction. But what are stolen goods? Are we to look to our own law, or to the law of Nova Scotia, to determine what is a felonious taking, what is the *animus furandi*, and the like? If we look to the law of Nova Scotia, and that law is different from ours, in defining and prescribing theft, then we may be called on to punish as a crime that which would be innocent here. If we look to our own law, then a taking and carrying away of goods in Nova Scotia, under circumstances which would not be criminal there, might be punishable here. Foreigners, coming within our jurisdiction with goods, and complying with customary regulations, commit no offence, and commit none in removing

them from place to place in the same or different counties. If they can be indicted and punished here, on the ground that such goods were stolen goods when they were brought in, it is but another mode of charging that the goods were obtained by a violation of the criminal laws of another country, and our courts must necessarily take jurisdiction of the violations of the criminal laws of foreign independent governments, and punish acts as criminal here, solely because they are in violation of the laws of such government, and which, but for such violation, would not be punishable here. It seems difficult to distinguish this from judicially enforcing and carrying into effect the penal laws of another government, instead of limiting our criminal jurisprudence to the execution of our own.

*New trial ordered.*

*J. H. Clifford*, Attorney General, for the Commonwealth.

*J. H. Bradley*, for the defendant.

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### COMMONWEALTH v. HOLDER.<sup>1</sup>

September Term 1857.

*Larceny — Property stolen in one of the United States and brought into this Commonwealth.*

Stealing goods in another of the United States, formerly a colony of Great Britain, and bringing them into this commonwealth, may be punished as larceny here.  
THOMAS J. dissenting.

INDICTMENT for stealing at Milford in this county goods of Henry W. Dana. At the trial in the court of common pleas there was evidence that the defendant broke and entered the shop of said Dana at Smithfield in the State of Rhode Island, and stole the goods mentioned in the indictment, and brought them into this county. The defendant asked that the jury might be instructed that the indictment could not be maintained, because the courts of this State could not take cognizance of a larceny committed in another State. But Mellen C. J. refused so to instruct the jury, and instructed them that the evidence, if believed, was sufficient

<sup>1</sup> 9 Gray, 7.

to support the indictment. The defendant, being convicted, alleged exceptions.

*G. F. Verry*, for the defendant.

*J. H. Clifford*, Attorney General, for the Commonwealth.

SHAW C. J. A majority of the court are of opinion that this case must be considered as settled by the case of *Commonwealth v. Uprichard*, 3 Gray, 434, and the principles stated, and the precedents cited. Though to some extent these colonies before the Revolution were distinct governments, and might have different laws, it was not unreasonable, as they all derived their criminal jurisprudence from the English common law, to regard the rule applicable to a theft, in an English county, of goods carried by the thief into another, as analogous, and adopt it. We are of opinion that Massachusetts did adopt it, and this is established by judicial precedent, before and since the Revolution, and is now settled by authority as the law of this State.

THOMAS J. The real question in this case is, whether the defendant can be indicted, convicted, and punished in this commonwealth for a larceny committed in the State of Rhode Island. If it were a new question, it would be enough to state it. The obvious, the conclusive answer to the indictment would be, that the offence was committed within the jurisdiction of another, and, so far as this matter is concerned, independent State, of whose law only it was a violation, and of which its courts have exclusive cognizance. By the law of that State the offence is defined and its punishment measured. By the law which the defendant has violated he is to be tried. Whether the acts done by him constitute larceny, and, if so, of what degree, must be determined by that law. Its penalties only he has incurred. Its means of protection and deliverance he may justly invoke, and especially a trial by a jury of his peers in the vicinage where the offence was committed.

This obvious view of the question will be found upon reflection, I think, to be the only one consistent with the reasonable security of the subject or the well defined relations of the States. It is well known that the laws of the States upon the subject of larceny materially differ. In most of them the common law of larceny has been greatly modified by statutes. The jurisprudence of all is not even based on the common law. In several the civil law obtains.

In cases where a difference of law exists, by which law is the defendant to be judged; the law where the offence (if any) was committed, or where it is tried? For example, the defendant is charged with taking with felonious intent that which is parcel of the realty, as the gearing of a mill or fruit from a tree. By the St. of 1851, ch. 151, the act is larceny in this commonwealth. If it appears that in the State where the act was done it was, as under the common law, but a trespass, which law has the defendant violated, and by which is he to be tried? Or suppose the defendant to be charged with the stealing of a slave—a felony in the State where the act is done, but an offence not known to our laws. The difficulty in both cases is the same. You have not only conflicting jurisdictions, but different rules of conduct and of judgment.

But supposing the definitions of the offence to be the same in the two States, the punishments may be very different. Where such difference exists, which penalty has the defendant justly incurred, and which is he to suffer? For example, the offence is punishable by imprisonment in Rhode Island, say for a year; in this State the same offence is punishable by imprisonment from one to five years; is the defendant liable to the heavier punishment? Or suppose he has been convicted in Rhode Island, and in consideration of his having indemnified the owner for the full value of the goods taken, his punishment has been more mercifully measured to him, can he, after he has suffered the punishment, and because the goods were, after the larceny, brought into this State, be made to suffer the penalty of our law for the same offence? Or suppose him to have been convicted in Rhode Island and a full pardon extended to him, can he be tried and convicted and punished here?

Again; the power to indict, convict and punish the offence in this State proceeds upon the ground that the original caption was felonious. If the original taking was innocent or but a trespass, the bringing into this State would not constitute a larceny. You must therefore look at the law of the State where the first caption was made. And how is the law of another State to be ascertained? What is the law of another State is a question of fact for the jury. The jury in this way are in a criminal case made not only to pass upon the law, but to pass upon it as a matter of evidence, subject, strictly speaking, neither to the direction nor the revision of the court.



Again; the defendant is indicted here for the larceny committed in Rhode Island; while in custody here awaiting his trial, he is demanded of the executive of this State by the executive of Rhode Island as a fugitive from the justice of that state, under the provisions of the Constitution of the United States, art. 4, § 2, and the U. S. St. of 1793, ch. 45. Is he to be tried here, or surrendered up to the State where the offence was committed and tried there? Or if he has been already tried and convicted and punished in this State, is he to be sent back to Rhode Island to be tried and punished again for the same offence? And would his conviction and punishment here be any answer to the indictment there? Or if he has been fully tried and acquitted here and then demanded by the executive of Rhode Island, is he, upon requisition, to be sent to that State to be again tried, to be twice put in jeopardy for the same offence? It is quite plain no ground in law would exist for a refusal to surrender.

The defendant was indicted for larceny, not for the offence of bringing stolen goods into the commonwealth. He was, under the instruction of the presiding judge, tried for the larceny in Rhode Island, was convicted for the larceny in Rhode Island, and must be punished, if at all, for the larceny in Rhode Island. And, under the rule given to the jury, is presented a case where, for one and the same moral act, for one and the same violation of the rights of property, the subject may be twice convicted and punished. Nay more, if a man had stolen a watch in Rhode Island and travelled with it into every State of the Union, he might, under the rule given to the jury, if his life endured so long, be indicted and punished in thirty-two States for one and the same offence.

And it is well to observe that it is the retention of the property which is the cause of the new offence, and the carrying of it from the place of caption into another State. If the defendant had stolen property in Rhode Island, and consumed or destroyed it, and then had removed to Massachusetts, but one offence would have been committed, and that in Rhode Island.

Such are some of the more obvious difficulties attending the position that an offence committed in one State may be tried and punished in another. The doctrine violates the first and most elementary principles of government. No State or people can assume to punish a man for violating the laws of another State or people. The surrender of fugitives from justice, whether under

the law of nations, treaties with foreign powers, or the provisions of the Constitution of the United States, proceeds upon the ground that the fugitive cannot be tried and punished by any other jurisdiction than the one whose laws have been violated. Even in cases of the invasion of one country by the subjects of another, it is the violation of its own laws of neutrality, that the latter country punishes, and not the violation of the laws of the country invaded. The exception of piracy is apparent rather than real. Piracy may be punished by all nations, because it is an offence against the law of nations upon the seas, which are the highways of nations.

The ruling of the learned chief justice of the common pleas was, I may presume, based upon the decisions of this court in *Commonwealth v. Cullins*, 1 Massachusetts, 116, and *Commonwealth v. Andrews*, 2 Massachusetts, 14.

It is certainly the general duty of the court to adhere to the law as decided. Especially is this the case where a change in the decision would impair the tenure by which the rights and property of the subject are held. But even with respect to these, where it is clear a case has been decided against the well settled principles of law and of reason, it is the duty and the practice of the courts to revise such decision; and to replace the law on its old and solid foundation. This is peculiarly the duty of the courts where such decision works its injustice by impairing the personal rights of the citizen, or by subjecting him to burdens and penalties which he never justly incurred.

In my judgment, the courts of this commonwealth have not, and never had, under the Constitution of the United States or otherwise, the rightful power to try a man for an offence committed in another State. It is in vain, it seems to me, to attempt to preserve, and make rules of conduct, decisions founded upon wholly erroneous views of the relations which the States of the Union bear to each other under the Constitution, and in conflict with well settled principles of constitutional and international law.

I should be content to rest my dissent from the judgment of the court in the case at bar upon the principles affirmed in the recent case of *Commonwealth v. Uprichard*, 3 Gray, 434; ante p. 371. In effect that case overrules, as its reasoning thoroughly undermines, the earlier cases. They cannot stand together.

But as the decision in the case at bar rests upon the authority

of the cases in the first and second of Massachusetts Reports, it may be well to examine with care the grounds upon which they rest. Such an examination will show, I think, not only that the cases were put upon erroneous views as to the relation of the States, but that they were also unsound at common law.

In the case of *Commonwealth v. Cullins*, a jury trial where three judges of the court were present, the evidence showing that the goods were taken in the State of Rhode Island, Mr. Justice Sedgwick, who charged the jury, said that "the court were clearly of opinion that stealing goods in one State and conveying stolen goods into another State was similar to stealing goods in one county and conveying the stolen goods into another, which was always holden to be felony in both counties." Whatever the points of similarity, there was this obvious and vital difference, to wit, that conviction in one county was a bar to conviction in another, and that conviction in one State is no bar to conviction in another State.

It was a doctrine of the common law, that the asportation of stolen goods from one county to another was a new caption and felony in the second county; a legal fiction, devised for greater facility in convicting the offender where it was uncertain where the first caption took place. The foundation of the rule was that the possession of the owner continued, and that every moment's continuance of the trespass may constitute a caption as well as the first taking. But in what respect was the taking in one State and conveying into another State similar to the taking in one county and conveying into another county? It could only be "similar" because the legal relation which one State bears to another is similar to that which one county bears to another; because, under another name, there was the same thing. If a man is to be convicted of crime by analogy, the analogy certainly should be a close one. Here it was but a shadow. In the different counties there was one law, one mode of trial, the same interpretation of the law and the same punishment. The rule, mode of trial, and jurisdiction were not changed.

The States of the Union, it is quite plain, hold no such relation to each other. As to their internal police, their law of crimes and punishments, they are wholly independent of each other, having no common law, and no common umpire. The provision, indeed, in the Constitution of the United States for surrendering up fugitives from justice by one State to another is a clear recognition of the

independence of the States of each other in these regards. It excludes the idea of any jurisdiction in one State over crimes committed in another, and at the same time saves any necessity or reason for such jurisdiction. Nor is there any provision in the Constitution of the United States, which impairs such independence, so far as the internal police of the States is concerned. On the other hand, the widest diversity exists in the institutions, the internal police and the criminal codes of the several States, some of them, as Louisiana and Texas, having as the basis of their jurisprudence, the civil and not the common law. In the relation which Louisiana holds to this State can any substantial analogy be found to that which Surrey bears to Middlesex?

An analogy closer and more direct could have been found in the books when *Commonwealth v. Cullins* was decided. It was that of Scotland to England, subject both to one crown and one legislature; yet it had been decided that when one stole goods in Scotland, and carried them to England, he could not be convicted in the latter country. *Rex v. Anderson* (1763) 2 East P. C. 772. 2] Russell on Crimes (7th Amer. ed.) 119. Or an analogy might have been found in the cases of goods stolen on the high seas and brought into the counties of England, of which the courts of common law refused to take cognizance, because they were not felonies committed within their jurisdiction. 1 Hawkins P. C. ch. 33, § 52. 3 Inst. 113. In these cases a test would have been found, applicable to the alleged larceny of Cullins, to wit, the offence was not committed in a place within the jurisdiction of the court, but in a place as foreign to their jurisdiction, so far as this subject-matter was concerned, as England or the neighboring provinces. The case of *Commonwealth v. Cullins* has no solid principle to rest upon.

The case of *Commonwealth v. Andrews*, two years later, may be held to recognize the rule laid down in *Commonwealth v. Cullins*, though it was an indictment against Andrews as the receiver of goods stolen by one Tuttle in New Hampshire; and though there is, at the least, plausible ground for saying that there was a new taking by Tuttle at Harvard in the county where the defendant was indicted and tried. Indeed, Mr. Justice Parker takes this precise ground; though he adds that "the common-law doctrine respecting counties may well be extended by analogy to the case of States, united, as these are, under one general government." If that union was with reference to or concerned the

internal police or criminal jurisprudence of the several States ; if it was not obviously for other different, distinct and well defined purposes ; and if we could admit the right of the court to extend by analogy the provisions of the criminal law and so to enlarge its jurisdiction ; there would be force in the suggestion. As it is, we must be careful not to be misled by the errors of wise and good men.

Judge Thatcher puts the case wholly on the felonious taking at Harvard.

Mr. Justice Sedgwick, though having the same view as to the taking at Harvard, does not rest his opinion upon it, but upon the ground that the continuance of the trespass is as much a wrong as the first taking. This doctrine applies as well where the original caption was in a foreign country, as in another State of the Union. If you hold that every moment the thief holds the property he commits a new felony, you may multiply his offences *ad infinitum* ; but in so carrying out what is at the best a legal fiction, you shock the common sense of men and their sense of justice. Mr. Justice Sedgwick will not admit the force of the objection that the thief would be thus twice punished, but regards with complacency such a result. But as we are to presume that the punishment is graduated to the offence, and, as far as punishment may, expiates the wrong, the mind shrinks from such a consequence. But saying that whatever he might think upon this question if it were *res integra*, he puts his decision upon the case of *Paul Lord* decided in 1792, and that of *Commonwealth v. Cullins*.

Chief Justice Dana relies upon the cases before stated and a general practice, and also upon the principle that every moment's felonious possession is a new caption.

Such was the condition of the law in this State when the case of *Commonwealth v. Uprichard* came before the court. In that case the original felonious taking was in the province of Nova Scotia. The bringing of the stolen goods into this commonwealth was held not to be a larceny here. But if it be true that every act of removal or change of possession is a new caption and asportation ; that every moment's continuance of the trespass is a new taking ; if this legal fiction has any life, it is difficult to see why the bringing of the goods within another jurisdiction was not a new offence. No distinction in principle exists between this case, and a felonious taking in another State and bringing into this. So far as the law of crimes and punishments is concerned, the States are as in-

dependent of each other as are the States and the British Provinces.

The case of *Commonwealth v. Uprichard* rests, I think immovably, upon the plain grounds that laws to punish crime are local and limited to the boundaries of the States which prescribe them; that the commission of a crime in another State or country is not a violation of our law, and does not subject the offender to any punishment prescribed by our law. These are principles of universal jurisprudence, and as sound as they are universal.

It is sometimes said that after all the offender is only tried and convicted for the offence against our laws. This clearly is not so. It is only by giving force to the law of the country of the original caption, that we can establish the larceny. It is the continuance of the caption felonious by the law of the place of caption. In the directions given to the jury such effect is given to the laws of Rhode Island. The jury were instructed that if the defendant broke and entered into the shop of Henry W. Dana in Smithfield in Rhode Island, and thence brought the goods into this county, the indictment could be maintained. The felonious taking in Rhode Island is the inception and groundwork of the offence. The proceeding is in substance and effect but a mode of enforcing the laws of and assuming jurisdiction over offences committed in another State.

For the reasons thus imperfectly stated, I am of opinion that the instructions of the Court of Common Pleas were erroneous, that the exceptions should be sustained, the verdict set aside and a new trial granted.

*Exceptions overruled.*

Whether an indictment for larceny can be supported where property is originally stolen in one of the United States, and carried into another State, where the indictment is found, is a question upon which the cases are in conflict. The doctrine laid down by the majority of the court in *Commonwealth v. Holder* has been adopted in Connecticut, Maryland, Vermont, Ohio, Mississippi, and in Kentucky. *Rex v. Peas*, 1 Root, 69. *The State v. Ellis*, 3 Connecticut, 185. *Cummings v. The State*, 1 Harris & Johnson, 340. *The State v. Mockridge*, cited in 11 Vermont, at p. 654. *Hamilton v. The State*, 11 Ohio, 435. *Watson v. The State*, 36 Mississippi, 593. *Ferrill v. The Commonwealth*, 1 Duvall, 153.

A contrary doctrine has been held in North Carolina, New York, Tennessee, Louisiana, Indiana, Iowa, and in New Jersey. *The State v. Brown*, 1 Haywood, 100 (1794). *The People v. Gardner*, 2 Johnson, 477 (1807). *The People v. Schenck*, 2 Johnson, 479 (1807). *Simpson v. The State*, 4 Humphreys, 456 (1844). *The State v. Reonnals*, 14 Louisiana Annual, 278 (1859). *Beal v.*

The State, 15 Indiana, 378 (1860). *The State v. Bennett*, 14 Iowa, 479 (1863). *The State v. Le Blanch*, 2 Vroom, 82 (1864). In New York the rule has been changed by statute, upon which the case of *The People v. Burke* was decided. Similar statutes have been passed in Alabama, Missouri, and in some other States. *The State v. Seay*, 3 Stewart, 123. *The State v. Adams*, 14 Alabama, 486. *Murray v. The State*, 18 Alabama, 727. *Hemmaker v. The State*, 12 Missouri, 453.

But in North Carolina, in 1799, it was decided that the legislature of that State had not the power to define and punish crimes committed in another State. *The State v. Knight*, Taylor, 65. In this case the defendant was indicted under the act of 1784, ch. 35, § 4, which is in these words: "Whereas there is reason to apprehend that wicked and ill-disposed persons, resident in the neighboring States, make a practice of counterfeiting the current bills of credit of this State; and by themselves, or emissaries, utter or vend the same with an intention to defraud the citizens of this State. Be it enacted, &c. that all such persons shall be subject to the same mode of trial, and on conviction liable to the same pains and penalties, as if the offence had been committed within the limits of this State, and be prosecuted in the Superior Court of any district of the State." Taylor J.: "As the prisoner was unassisted with counsel at his trial, we have felt it to be our duty to examine whether this indictment and conviction be warranted by a just application of criminal justice and, of a general jurisprudence; and an inquiry having produced great doubts as to the validity of this section of the act, independent of the indefinite terms in which it is expressed, we have thought it right that this judgment should be arrested. The States are to be considered, with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective Constitutions, and by that of the United States. Crimes and misdemeanors committed within the limits of each, are punishable only by the jurisdiction of that State where they arise; for the right of punishing, being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens, and who likewise committed the offence beyond the territorial limits of the State claiming jurisdiction. Our legislature may define and punish crimes committed within the State, whether by citizens or strangers; because the former are supposed to have consented to all laws made by the legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws, as long as they remain in the State; but they cannot define and punish crimes committed in another State, the citizens of which, while they remain there, are bound to regulate their civil conduct only according to their own laws. If our legislature does not rightfully possess such a power, its assumption and exercise should be carefully avoided, lest our own citizens should be harassed under the operation of similar laws enacted in other States; whereby acts, against which the policy of this State did not require that any punishment should be denounced, may be punished in other States with exemplary severity. This may happen in relation to those acts which are not criminal in the State where committed; but the consequences will be far more serious if the acts are originally criminal, for then a conviction and punishment in a State having no right to entertain jurisdiction of the offence, and consequently

to inflict the punishment, will be disregarded in the courts of that State, where the offence arose. The crime described in this section of the act is no doubt punishable in Virginia as a common-law misdemeanor, and although the punishment may be less severe than that prescribed by our act of assembly, yet it is better to yield up the offender to the laws of his own State, than by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister State to legislate against acts committed by our own citizens, and within the limits of our own territory."

It is to be observed that in some of the States the rule has been put explicitly not upon any general reasons, but upon the existence of a local practice which had grown up, sub silentio. Thus in *The State v. Ellis*, 3 Connecticut, 185, the court declined all theoretical discussion of the point, and contented themselves with reposing on local precedent, saying, that "it is much too late to recur to first principles." *The State v. La Blanch*, 2 Vroom, at p. 86. In principle, the law is undoubtedly as stated in the dissenting opinion of Mr. Justice Thomas in the text. In the admirable judgment in *The State v. Brown*, 1 Haywood, 100 (1794), Ashe J. said: "If this man were tried and condemned here, or tried and acquitted here, would the sentence of this court be pleadable in bar to an indictment preferred against him in the territory south of the Ohio, where the crime was committed? I think it would not; because the offence against the laws of this State and the offence against the laws of that country are distinct; and satisfaction made for the offence against this State is no satisfaction for the offence committed against the laws there. The consequence then of trying this man here, and condemning him, will be, if a man steals a horse in one part of the continent, and goes with him to another, through several States, the culprit, according to the several laws of each State, being guilty of a taking in each, may be cropped in one, branded and whipped in another, imprisoned in a third, and hanged in a fourth: and all for the same offence. This is against natural justice, and therefore I cannot believe it to be law. When a man steals in this State and carries the thing stolen into another county, he is guilty of the same offence, and punishable in the same degree and by the same law in the latter as in the former county, and is punishable but once. If convicted or acquitted in the latter county, he may plead autrefois convict or acquit, of the same felony before, when indicted in the former; which shows that the law considers the felony that was committed in the first, otherwise it could not be pleaded as the same in the case before mentioned. Now if the felony in this State, is the same felony that was committed in the territory south of the Ohio, then it is a felony against the laws of the territory, and punishable there by pillory, branding, and whipping, and not by death. It would be strange then to say he should be punished here with death for an offence against the laws of another State which punishes only with infamy."

In *Simmons v. The Commonwealth*, 5 Binney, 617, this doctrine was clearly and tersely stated by Tilghman C. J. "This is an indictment for larceny. The property was originally stolen in the State of Delaware, and afterwards brought by the thief into this city. The jury found a special verdict; and the question submitted to the court is, whether under such circumstances, an indictment can be supported in the mayor's court. The point has never been expressly decided; but it is understood, that a practice has prevailed sub silentio, under which there



have been convictions in several of the courts of the State. This practice was founded on the general principle, that possession in the thief amounts to a larceny in every county into which he carries the goods, because the legal possession still remains in the true owner, and therefore every moment's continuance of the felony amounts to a new caption and asportation. There is considerable subtlety in this principle. It was probably adopted for the convenience of trying the felon in the county where he was taken with the goods in his possession. For it is scarcely reconcilable to plain common sense to say, that the continuance of the possession amounts to a new taking. It is in fact but one and the same felony, and so it is considered in law; for if the thief, after carrying the goods from the county in which they were stolen, to another county, and after being indicted and convicted in the latter, should be again indicted in the former, he may plead the conviction in bar, which could not be done if they were different felonies. I consider the principle which I have mentioned as bordering upon a fiction, and although it is so well established as not now to be called in question, yet there is no reason why we should give it greater extent than it has received in the English common law from whence we took it. Now it was never extended by that law to cases where the original taking was without the kingdom. This is expressly stated by Lord Coke in 3 Institute, 113, and 13 Rep. 53, in proof of which he cites Butler's Case in the 28th year of Elizabeth. It was the opinion of the Judges at that time that no offence was punishable at common law which was committed without the jurisdiction of the common law, that is, out of the kingdom. This ancient doctrine has been adhered to in modern times, as appears in 2 East's Crown Law, 772, where the case of *The King v. Anderson* is cited, in which it was determined by all the Judges in the year 1763 that no indictment lay in England for goods stolen in Scotland and brought into England. This was found inconvenient, and therefore, so far as respected goods stolen in Scotland, a remedy was provided by stat. 13 Geo. III. ch. 31. But I have never heard it suggested that the English courts assumed a criminal jurisdiction in case of goods stolen beyond sea, and brought into England. It may be said to be inconvenient not to exercise jurisdiction in cases of goods stolen in one of the United States, and brought into another, and it appears to me it will be inconvenient. But the legislature may at their pleasure apply the remedy, as the British Parliament did. I feel myself treading on tender ground, when criminal jurisdiction is in question; and I confess that I had rather see a hundred culprits escape, than extend such jurisdiction a hair's-breadth beyond its constitutional limits. The Constitution of the United States provides for the case of an offender flying from the State in which the offence is committed. Wherever he is found, he may be secured and sent to that State for trial, on demand of the executive thereof. If we should punish him, he may be punished again in the State to which he may be sent; for certainly the courts of that State are not bound to pay any regard to our proceedings. A conviction here is no bar to an indictment there. The different States are altogether as independent of each other in point of jurisdiction, as any two nations; and if murder committed in one State, should be prosecuted in another to which the murderer had fled, without the authority of an act of assembly, we should at once be shocked at the proceeding. In the Supreme Court of New York, it has been decided that larcenies committed out of the State cannot be prosecuted within it, although the goods are brought

there. 2 Johnson, 477, 479. In the State of Massachusetts the contrary opinion has been held. 1 Massachusetts, 116. 2 Massachusetts, 14. It appears however that the Judges of Massachusetts relied very much on a decision in their own courts, by which they conceived themselves bound, and the case of *The King v. Anderson*, cited in 2 East P. C. 772, from a manuscript report, does not seem to have been known, because it is mentioned by Judge Sedgwick, that the only case relied upon as directly in point, was *Butler's Case*, 3 Institute, 113. If the point had ever been decided in this court upon solemn argument, I should have been for letting it rest. But that not being the case, we must take it up as *res integra*, and I am of opinion that the mayor's court had no jurisdiction, and therefore the judgment should be reversed."

In *The State v. Le Blanch*, 2 Vroom, 80, Chief Justice Whelpley, after an examination of the English authorities, says at p. 85: "From this review it would seem to be clear that the common-law doctrine, arising from the transfer of stolen property from one county to another, affords no countenance to the idea that a larceny committed under one system of criminal law can be punishable under another and different system. The principle adopted was simply this, that a taking would be implied from the possession of the chattels in those cases in which the first caption of them was an infringement of the common law; thus the measure of the crime, the mode of trial, the extent of punishment, and the effect of the conviction, would be identical in whichever county the trial occurred." And after reviewing the American cases, he states the result to be this: "That the principle that a larceny can be inferred from the possession of the goods in a foreign jurisdiction is opposed to the English law, and likewise to all the decisions in this country which assume to be founded in legal science; and that all that it has in its support is a local usage in some of the States." The Chief Justice then proceeds to discuss the doctrine or principle apart from authority in the following lucid and satisfactory manner: "But the doctrine in question is not only inconsistent with authority, but is incompatible with the general principles of law and natural justice. It is universally conceded that criminal laws are in their nature local, and in their operation are confined within the limits of the State in which they are enacted. But when larceny is inferred from the possession of the stolen property in a jurisdiction other than that in which the original felonious taking occurred, it is impossible to overlook the fact that it is the foreign and not the domestic law which is enforced. For illustration, suppose goods taken under such circumstances as to give rise to the question whether the act is a larceny or a mere breach of trust—which law is to be regarded in settling the question? All will admit that it is the foreign law which must determine the criminality or the innocence of the act, for it will scarcely be pretended, that if the original acquisition of the property was not criminal it can be made so by the transportation of such property into a new jurisdiction. In all cases then of this nature the judge trying the cause must decide whether, by force of the facts proved, the offence was larceny in the place of the original transaction; and if the proposition was solved in the affirmative, the prisoner would be convicted, but if in the negative, the result would be an acquittal. It is obvious that this is not the execution of the domestic law, but the enforcement of the penal code of a foreign government. . . . But a still more substantial objection to the practice is, that it renders the trial inconclusive. A larceny

is committed when with the requisite felonious intent there has been a taking and asportation; *the conveyance of the property over a territorial line cannot duplicate the criminality.* In the eye of reason and in the nature of things it is but a single offence, both before and after such transportation. The consequence is that the criminal, as a matter of ordinary justice, should be but once tried for the offence."

In Maine it has been recently decided that stealing goods in a British province and bringing them, by the thief, into that State, and having them in his possession there, is larceny in that State. *The State v. Underwood*, 49 Maine, 181 (1858). In delivering the opinion of the majority of the court, Hathaway J. well said with reference to the reasoning of Chief Justice Shaw, in *Commonwealth v. Uprichard*, that if it "were well founded and correct it would apply with equal force to the case of goods stolen in another State as to that of goods stolen in a foreign government, for in their administration of criminal law the several States are sovereign, and in their respective jurisdictions and in the laws which regulate their internal police they are as foreign to each other as each State is to foreign governments." And in the same case Davis J. said: "The distinction which Shaw C. J. attempts to draw between the case of larceny in another State and in a foreign country, is, in my judgment, entirely without any foundation. If a conviction can be maintained in the former case, I think it must be in the latter, and until we are ready to reject the doctrine in both classes of cases, I think we should uphold it in both." And with reference to the doctrine of constructive larcenies between the States, he observed that it could not be maintained either on principle or by the weight of authority. In a very able dissenting opinion in *The State v. Underwood*, Rice J. very clearly shows the unsoundness of the principle on which this class of cases rests. "The decisions in these cases," he says, "are based upon some supposed analogy between the common-law rule respecting counties, and the condition of the United States existing under one general government. The supposed analogy will be found, on examination, not to exist. Text writers and jurists have undoubtedly been led into error on this subject, by a reference to the reason given for the common-law rule for taking cognizance of a larceny in any county into which the stolen property may be taken by the thief. The reason generally given being, that every moment's possession of the stolen property is a new larceny, and therefore the party is necessarily guilty in any county into which the stolen property may be carried by him. If this were so, the conclusion would undoubtedly be correct, and the thief would be guilty of as many separate offences, for each of which he would be liable to distinct punishment, as there would be found divisible points of time during which the stolen property was in his possession. But the statement of a proposition so monstrous is its most effectual refutation. Larceny consists in a felonious caption and asportation. When the property is thus taken and carried away the offence is complete, and cannot be multiplied into an infinite number of offences by a simple retention of the stolen property. The courts always treat it as a single offence in practice, subject to but one punishment, however long the stolen property may have been retained or into how many counties it may have been carried by the thief. One conviction is a perfect bar to a second prosecution for one taking, without regard to the length of

time the property may have been retained or through how many counties it may have been transported. The offence is single, and against the State or sovereignty within whose jurisdiction it is committed."

It is a leading principle in the law of larceny, that the possession of goods stolen by the thief is a larceny in every county into which he carries the goods; because the legal possession still remaining in the true owner, every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation. *The State v. Douglass*, 17 Maine, 193. *Commonwealth v. Cousins*, 2 Leigh, 708. On this principle it has been held that, if, between the original theft and the finding of the indictment, the old statute relating to larceny has been superseded by a new one, the thief, who retains possession of the goods, may be proceeded against under the new statute. *The State v. Somerville*, 21 Maine, 14. And the principle on which this rule is founded extends as well to bank-notes, and other property made subject to larceny by statute, as to goods which are the subject of larceny at common law. *Commonwealth v. Rand*, 7 Metcalf, 475. The stealing of things affixed to the freehold was not a larceny at common law, but was made felony by statute. In *Rex v. Millar*, 7 Carrington & Payne, 665, Parke J., Alderson B. and Patteson J. held that the prisoner could not be indicted in any county except the one in which the fixtures were first taken. In this case the defendant ripped lead from a church in Buckinghamshire, and, afterwards, having it in his possession in Middlesex, was indicted in the latter county for a simple larceny at common law; it was held that the indictment could not be sustained. The lapse of time between the first taking and the carrying into another county is not material. In *Rex v. Parkin*, 1 Moody C. C. 45; 1 Lewin C. C. 316, the prisoner stole a note in Yorkshire on the fourth of November 1823, and on the seventeenth of March 1824 brought it into the county of Durham, and there endeavored to utter it; at the trial before Bailey J. in the latter county, for the offence, the judge doubted whether, considering the long interval between the theft and the bringing the note into Durham, this could properly be deemed a felony in the county of Durham, and reserved the point for the consideration of the Judges. They were clearly of opinion, that the interval between the first taking and the carrying the note into Durham did not prevent the offence from being a larceny in Durham.

But this rule is limited to simple larceny. If a compound larceny is committed in one county, and the offender carry the property into another, though he may be convicted in the latter county of the simple larceny, he cannot be there convicted of the compound larceny. The larceny itself is ambulatory, but the aggravated circumstances are fixed and stationary. Thus where the prisoner robbed the mail of a letter either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted capitally in Middlesex on the 5 Geo. III. ch. 25, § 7, and 7 Geo. III. ch. 40, the Judges, upon a case reserved, held that he could not be convicted capitally out of the county in which the letter was taken from the mail. *Rex v. Thomson*, 2 Russell on Crimes, 328. 4th ed. The rule prevails in cases of robbery. The robbery can only be tried in the county where committed; *the felony travels*. 1 Hale P. C. 536. The larceny may however, in some respects, be considered as a new larceny, and as not necessarily including all the qualities of the original larceny. Therefore, if the thing stolen is altered

in character in the first county so as to be no longer what it was when stolen, an indictment in the second county must describe it according to its altered and not according to its original state. An indictment was preferred in Hertfordshire for stealing four live tame turkeys; and it appeared that they were stolen alive in Cambridgeshire, killed there, and carried dead into Hertfordshire; and upon the point being raised, the Judges held that though the carrying into Hertfordshire constituted a larceny in that county, yet it was a new larceny there, and a larceny of dead turkeys, not of live ones. *Rex v. Edwards, Russell & Ryan C. C. 497.* *Commonwealth v. Beaman, 8 Gray, 497,* is not distinguishable in principle from *Rex v. Edwards*. In the former case, the defendant was indicted for stealing "one peahen" and "one turkey" in Massachusetts. It was decided that the indictment was not supported by evidence of stealing them alive in Connecticut, and bringing them dead into Massachusetts. An indictment charging the larceny of an animal, without alleging it to be alive, in its legal acceptation, means a live animal; and the rule applies even if an animal has the same appellation whether dead or alive. *Commonwealth v. Beaman, 8 Gray, 497,* denying *Rex v. Puckering, 1 Moody C. C. 242,* and *1 Lewin C. C. 302.* And see *Regina v. Newland, 2 Cox C. C. 283,* per *Wilde C. J.;* *Regina v. Barry, 2 Cox C. C. 294,* and Mr. Greaves's observations on those cases, *2 Russell on Crimes, 330,* notes. 4th ed. And where a brass furnace, stolen in one county, was there broken in pieces, and the pieces were carried into another county, in which latter county the prisoner was indicted for larceny of a brass furnace there, he was acquitted for a variance; for it was not a brass furnace, but only broken pieces of brass that he had in that county. *Rex v. Halloway, 1 Carrington & Payne, 127.* Nor, where several commit a joint felony in the county of A., and there divide the goods, and afterwards separate, each carrying his respective share into the county of B., can they be indicted for a joint felony in the latter county? *Rex v. Barnett, 2 Russell on Crimes, 329.* 4th ed. But where goods are stolen by two persons in the county of S. and are carried by one of them into the county of C. and afterwards the other follows into the county of C. and there unites in the custody and disposal of the goods, both are guilty of larceny in the latter county. *Commonwealth v. Dewitt, 10 Massachusetts, 153.* *Rex v. County, 2 Russell on Crimes, 330.* 4th ed. The taking into the second county must be *animo furandi*: the mere possession there is not sufficient. Where a constable took the defendant, with two stolen horses, in Surrey, and, afterwards, at his request, rode with him on the horses into Kent, where he escaped, and the defendant being afterwards indicted in Kent, the Judges were unanimously of opinion, upon a case reserved, that there was no evidence of stealing in Kent. *Rex v. Simmonds, 1 Moody C. C. 408.*

REX v. JOHN.<sup>1</sup>

Easter Term 1790.

*Dying Declarations.*

If a dying declaration is tendered in evidence, and its admissibility rest upon the fact that the deceased believed, when he made it, that he was at the point of death, the question whether this fact be satisfactorily proved must be determined by the judge.

If it may reasonably be inferred from the nature of the wound, the state of illness, and other circumstances, that the deceased was sensible of his danger, his declarations are admissible.

ON the prosecution of Thomas John, for the murder of Rachael, his wife, it was proved by the confession of the prisoner himself, in conversation with others, before his wife's death, that in September 1789, upon a quarrel between them, he had laid hold of his wife, and they had fallen down, he uppermost, and he had given her several violent kicks and blows, so that, according to his own words, he knew she never would raise her hand against him again. It was also proved that she died in the same month; that she was taken ill on a Friday, took to her bed the next day, and died on the Sunday sevensnight following, being confined to her bed by her illness, which was severe, the whole time. But it did not appear that she had expressed any apprehension of danger, though she retained her senses till the day before her death. Three witnesses deposed to conversations during her illness, at which the husband was present, in which she attributed her situation to his ill treatment; and the conduct and answers of the husband were given in evidence, although it was objected, on his behalf, that what was said by the wife, even in the presence of the husband, and to which he returned answers tending to charge himself, ought not to have been received. Evidence was also given of her declarations in the prisoner's absence, after she was confined to her bed, all of which tended to show the circumstances of violence he had committed upon her. It was objected, that the declarations of the wife, in the absence of the prisoner, ought not to have been admitted in evidence, as it was not proved that she considered herself at the time as a dying person, the evidence not being express on that

<sup>1</sup> 1 East P. C. ch. 5, § 124, p. 357.

head; but that, if the evidence were admissible, it ought to have been left to the jury to consider whether the wife were at the time conscious of approaching death. Objection was also made, that these being declarations of a wife against her husband, were not, on that account, evidence.

The court was of opinion, that the reason of the rule, that a wife shall not be admitted to give evidence against her husband, did not apply to this case. And upon the other point, that the evidence of the state of the wife's health, at the time the declarations were made, was sufficient to show that she was actually dying; and that it was to be inferred from it that she was conscious of her situation; and no particular direction was given to the jury on the subject.

The jury having found the prisoner guilty, these points were referred to the Judges, who, at a conference in Easter term 1790, all agreed that it ought not to be left to the jury to say whether the deceased thought she was dying or not; for that must be decided by the judge before he receives the evidence. And if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. But as to the declarations themselves in this case, all the Judges, except two, thought that there was no foundation for supposing that the deceased considered herself in any danger at all.

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### THE KING *v.* MEAD.<sup>1</sup>

Hilary Term 1824.

#### *Dying Declarations.*

Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending the defendant shot the prosecutor, and, on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose:

*Held*, that it could not be read; for that dying declarations are admissible only where

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<sup>1</sup> 2 Barnewall & Cresswell, 605. 4 Dowling & Ryland, 120.

the death is the subject of the charge, and the circumstances of the death the subject of the declaration.

THE defendant was indicted for perjury, and at the Middlesex sittings, after Michaelmas term 1822, before Abbott C. J., was found guilty. In Hilary term 1823 a rule for a new trial was obtained by the Attorney General, on the ground of the verdict having been against the weight of evidence and upon affidavits.

*D. F. Jones* and *Chitty* now showed cause, and, amongst others, tendered affidavits, stating a dying declaration of James Law, the prosecutor, who was shot by the defendant after the conviction. The perjury assigned, and of which the defendant was convicted, consisted in Mead's swearing, upon the trial of an information in the Exchequer, that Law had been present at and engaged in a smuggling transaction, at a place called the Salt-Pans, in the parish of Scalby, in the county of York, on the 20th August 1820, and upon the trial of which information Law was acquitted. The dying declaration of Law, after giving an account of the circumstances under which he was shot by Mead, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to by Mead in the Court of Exchequer.

The *Attorney General*, *Clarke*, *Gurney*, and *Walton* objected to these affidavits of the dying declaration being received. Dying declarations are only admissible in criminal prosecutions, where the death of the deceased, and the circumstances of the death, are the subject of the charge against a prisoner; whereas here the statement, disclosed by the affidavits tendered, was not made with reference to the death of the dying man, but with reference to the antecedent charge of perjury. In *Doe v. Ridgeway*, 4 Barnewall & Alderson, 53, it was held that the dying declarations of a person, as to the relationship between the lessor of the plaintiff and the person last seised, could not be received in evidence.

*D. F. Jones* and *Chitty*, contra, contended, that the affidavits as to the dying declarations were admissible. The general principle, upon which such evidence is competent, is founded partly on the situation of the dying man, which must be taken to have as much power over his conscience as the sanction of any oath could have, and partly on the manifest absence of any interest, when he is on the point of passing into another world. *Lord Mohun's Case*, 12



State Trials, 949. *Rex v. Reason*, 1 Strange, 499.<sup>1</sup> *Tinckler's Case*, 1 East P. C. 354. 2 Hume's Comm. on the Law of Scotland respecting Crimes, 391. The rule contended for on the other side, limiting evidence of this kind to cases of inquiry as to the cause or circumstances of death, is much too narrow; for in *Wright v. Littler*, 3 Burrow, 1244, evidence of a dying confession, by the subscribing witness to a deed, was held to be admissible. So also in the case before Heath J., cited in *Avison v. Lord Kinnaird*, 6 East, 195, the confession of an attesting witness to a bond, who, in his dying moments, begged pardon of Heaven for having been concerned in forging the bond, was received. Secondly, there was a connection in this case between the transaction to which the dying declaration referred and the occasion of the death. The false accusation, to which the dying declaration referred, was the foundation of the personal hostility which led to the death. Thirdly, whether it would have been evidence on the trial or not, it may be received for the purpose of satisfying the court upon the question of granting a new trial, in the same way as affidavits by parties themselves are received on similar occasions.

ABBOTT C. J. We are all of opinion that the evidence cannot be received. In the case before Mr. Justice Heath, the declaration amounted to a confession by the party himself of a very heinous offence which he had committed. The same observation applies to the case of *Wright v. Littler*.<sup>2</sup> Here, the dying declaration of Law was for the purpose, not of accusing but of clearing himself. It therefore falls, not within the exception on which those decisions proceeded, but within the general rule, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration.

*The affidavits were rejected.*

<sup>1</sup> In this case which is also reported in 16 Howell State Trials, 1, and is the earliest reported case on this subject, 1722, Sir John Strange says: "We who were counsel for the king offered to give in evidence several declarations, made by the deceased on his death-bed, whereby he charged the defendant with barbarously murdering him, and, without much hesitation, the court let us into that evidence."

<sup>2</sup> In *Stobart v. Dryden*, 1 Meeson & Welsby, 624, 627, these cases were virtually overruled.

There is an exception, in the law of evidence, to the general rule rejecting hearsay, in the case of declarations made by a person under the apprehension of approaching dissolution. "Speaking for myself," said Lord Chief Baron Pollock, in a very recent case, "I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England which I think ought not to be extended." *Regina v. Hinds*, Bell C. C. at p. 256 (1860).

The principle upon which this exception stands is clear and obvious. "It is presumed that a person, who knows that his dissolution is fast approaching, that he stands on the verge of eternity, and that he is to be called to an immediate account for all that he has done amiss, before a Judge from whom no secrets are hid, will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath." 1 Starkie Ev. (London ed. 1853) 32. This principle was thus stated by Lord Chief Baron Eyre: "They are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."<sup>1</sup> *Rex v. Woodcock*, 1 Leach C. C. (4th ed.) 502. In *Regina v. Smith*, Leigh & Cave C. C. at p. 622, Mr. Justice Blackburn observed during the argument: "The statement of a dying person as to the cause of death is admitted on the same ground as evidence of a wife against her husband; viz. as being often the only evidence obtainable."

"Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care," said Mr. Justice Byles. "They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions and of unintentional misrepresentations, both by the declarant and the witness. In order to make a dying declaration admissible there must be an expectation of impending and almost immediate death, from the causes then operating. The authorities show that there must be *no hope whatever*." *Regina v. Jenkins*, Law Rep. 1 C. C. at p. 193 (1869). And so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and renders such declarations admissible in no civil case,<sup>2</sup> and, in criminal cases, only

<sup>1</sup> Shakespeare, in *King John*, quoted in 1 Taylor Ev. § 644, has put the same sentiment into the mouth of the wounded Melun, who, finding himself disbelieved while announcing the intended treachery of King Lewis, exclaims:—

"Have I not hideous death within my view,  
Retaining but a quantity of life;  
Which bleeds away, even as a form of wax  
Resolveth from his figure 'gainst the fire?  
What in the world should make me now deceive,  
Since I must lose the use of all deceit?  
Why should I then be false; since it is true,  
That I must die here, and live hence by truth?"

Act V. Scene 4.

<sup>2</sup> It was even held, that the dying declarations of a pauper respecting his settlement were admissible, though that question involved both law and fact. *Rex v. Bury St. Edmund's*

in the single instance of *homicide*, "where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." *Regina v. Hinds*, Bell C. C. at p. 256. *Wilson v. Boerem*, 15 Johnson, 286. *Doe v. Ridgway*, 4 Barnewall & Alderson, 53. *The State v. Cameron*, 2 Chandler, 172. *Daily v. New York & New Haven Railroad Co.* 32 Connecticut, 366. *Walston v. Commonwealth*, 16 B. Monroe, at p. 34. Thus on a trial for robbery, the dying declaration of the party robbed has been rejected. *Rex v. Lloyd*, 4 Carington & Payne, 233. And where a prisoner was indicted for administering drugs to a woman, with intent to procure abortion, her statements in extremis were held to be inadmissible. *Regina v. Hinds*, Bell C. C. 253; 8 Cox C. C. 300; 29 Law Journal, M. C. 147. And on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who, on his death-bed, confessed that he had committed the crime. *Rex v. Gray*, Irish Circuit Reports, 76. But in one case, "the Judges appear to have intrenched somewhat upon this rule." On the trial of an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. *Rex v. Baker*, 2 Moody & Robinson 53 (1837). In this case Coltman J., after consulting Parke B., was of opinion, that as it was all one transaction, the declarations were admissible, and allowed them to go to the jury, but said he would reserve the point for the opinion of the Judges; but the prisoner was acquitted.

It has been repeatedly held, that the rule of the common law, by which this species of evidence is admitted, is not in conflict with, nor repealed by, the general rule of criminal law declared in the Constitution of the United States, and in the constitutions and statutes of nearly all the States in the Union, that "the accused shall enjoy the right to be confronted with the witnesses against him." *Anthony v. The State*, Meigs, 265. *Woodsides v. The State*, 2 Howard (Miss.) 655. *Robbins v. The State*, 8 Ohio State, n. s. 131. *The State v. Tilghman*, 11 Iredell, 513. *Commonwealth v. Carey*, 12 Cushing, 246. *The State v. Nash*, 7 Iowa, 347. *Campbell v. The State*, 11 Georgia, 353. *McDaniel v. The State*, 8 Smedes & Marshall, 401, 416. *Walston v. Commonwealth*, 16 B. Monroe, 15. But see *contrà*, *The Law Reporter*, Vol. IV. (n. s.) 221. In *Anthony v. The State*, Meigs, at p. 267, this principle was clearly stated as follows, by Reese J.: "The Bill of Rights cannot be construed to prevent declarations properly made in articulo mortis from being given in evidence against defendants in cases of homicide. The provision in the Bill of Rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which although fully acknowledged and acted upon before and at the time of our Revolution, had been yielded to the liberal or popular party in Great Britain after a long contest, and after very strenuous opposition from the Crown, from Crown lawyers, and, if I may so speak, Crown statesmen. In this case, as in that of libels and some others, the object of the Bill of Rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest. That

*Caldecott*, 486. *Abbotun v. Dunswell*, 2 Bott, 80. And in *Stobart v. Dryden*, 1 Meeson & Welsby, 615, 627, the dying declarations of a deceased subscribing witness to a forged instrument were offered in disparagement of the evidence afforded by his signature, but were rejected.

our view of this question is correct, is made manifest by the fact, that after more than forty years from the adoption of our first Constitution, this argument against the admissibility of dying declarations, on the ground of the Bill of Rights, is for the first time made, so far as we are aware, in our courts of justice; and if made elsewhere it does not appear to have received judicial sanction in any State."

The principle upon which this species of evidence is received being, "that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath," per Curiam, in *Rex v. Drummond*, 1 Leach C. C. (4th ed.) 337, 338, it follows, that if the declarant when living, was too young to comprehend the obligation of an oath, *Rex v. Pike*, 3 Carrington & Payne, 598; *Regina v. Perkins*, 2 Moody C. C. 135; 9 Carrington & Payne, 395; or was incompetent by reason of infamy, *Rex v. Drummond*, *ubi supra*, or imbecility of mind, his dying declarations are inadmissible.

From this principle it necessarily follows, that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behavior in his last moments, or may be allowed to show that the deceased was not of such a character as was likely to be impressed by a religious sense of his approaching dissolution. 1 Phillpotts Ev. 289, London ed. 1843. *Donnelly v. The State*, 2 Dutcher, 464. *Goodall v. The State*, 1 Oregon, 333.

On the other hand, as the testimony of an accomplice is admissible against his fellows, the dying declarations of a *felo de se* are admissible; but they are only admissible where the prisoner is charged with assisting in the self-destruction of the deceased, for the reason, that dying declarations are never admissible, except where the death of the person who made them is the subject of the indictment. *Rex v. Tinckler*, 1 East P. C. 354. And see the material parts of this case as reported in the Black Book, and MS. note of Lord Denman's, in the Preface to the first volume of Denison's Crown Cases.

Upon the same principle on which the testimony of the husband or wife is sometimes admitted, viz. as being the only evidence obtainable, the dying declarations of either are admissible, where the other party is charged with the murder of the declarant. Blackburn J. in *Regina v. Smith, Leigh & Cave* C. C. at p. 622. *Rex v. Woodcock*, 1 Leach C. C. (4th ed.) 500; 1 East P. C. 354, 356. *Pennsylvania v. Stoops*, Addison, 381. *The People v. Green*, 1 Denio, 614. *Moore v. The State*, 12 Alabama, 764. And see *Rex v. John*, in the text.

These declarations are admissible in evidence, if it appear to the satisfaction of the court: First, that at the time when they were made the declarant was in *actual danger of death*; secondly, that he should then have had a *full apprehension of his danger*, *Regina v. Cleary*, 2 Foster & Finlason, 850; and lastly, that *death should have ensued*. In the *Sussex Peerage Case*, 11 Clark & Finnelly, at p. 112, Lord Denman C. J. stated this principle as follows: "With regard to declarations made by persons in extremis, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time of the danger and of death, such declarations can be received in evidence; but *all these things must concur* to render such declarations admissible. Such evidence ought to be received with caution, because it is subject to no cross-examination."

All the Judges agreed at a conference in Easter term 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence. *Rex v. John*, in the text. *Rex v. Welbourn*, 1 East P. C. 358, resolved by all the Judges in Michaelmas term 1792.<sup>1</sup> *Rex v. Hucks*, 1 Starkie N. P. C. 523. *Bartlett v. Smith*, 11 Meeson & Welsby, at p. 486. And such has been the uniform practice in all the recent cases. 3 Russell on Crimes, 266. 4th ed. *The State v. Poll*, 1 Hawks, 442, 444. *Lamberth v. The State*, 23 Mississippi, 322, 354. *Hill v. The Commonwealth*, 2 Grattan, 594. *Commonwealth v. Murray*, 2 Ashmead, 41. *The State v. Howard*, 32 Vermont, 380. *The State v. Center*, 35 Vermont, 378. *Donnelly v. The State*, 2 Dutcher, 464. *People v. Glenn*, 10 California, 32. *Robbins v. The State*, 8 Ohio State, n. s. 131. And if the judge reserves the question, it may be reviewed by the full Court. *Channell B. in Regina v. Smith, Leigh & Cave C. C.* at p. 627. *Donnelly v. The State*, 2 Dutcher, 601.

The observations of Mr. Justice Skinner in concluding the opinion in *Starkie v. The People*, 17 Illinois, at pp. 24, 25, are worthy of attention in this connection: "The impossibility of knowing what effect upon the minds of the jury the hearing of this examination might have, or what tinge or coloring it might in their minds give to other evidence against the accused in case the evidence should not go to them finally as evidence, would suggest the propriety of sending the jury out in charge of a sworn officer pending this examination."

It is not necessary that the declarant should actually *express* any apprehension of danger, provided it satisfactorily appears to the court, in any mode that the declarations were made under a clear impression of impending death. And for this purpose all the circumstances of the case may be shown, which may tend to throw light upon the state of the mind of the deceased at the time when the declarations were made. If the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct in settling his affairs, disposing of his property, taking leave of his relations and friends, giving directions respecting his funeral or as to his place of burial, receiving extreme unction, or the like, it is sufficient. *Rex v. Woodcock*, 1 Leach C. C. (4th ed.) 500. *Rex v. Bonner*, 6 Carrington & Payne, 386; more fully reported in 3 Russell on Crimes, 256. 4th ed. *Rex v. Mosley*, 1 Moody C. C. 97. *Minton's Case*, *McNally Ev.* 386. *Regina v. Howell*, 1 Denison C. C. 1; 1 Carrington & Kirwan, 689; 1 Cox C. C. 151. *Regina v. Mooney*, 5 Cox C. C. 318. *Regina v. Thomas*, 1 Cox C. C. 52. *Anthony v. The State*, Meigs, 265. *Nelson v. The State*, 7 Humphreys, 542. *Commonwealth v. Murray*, 2 Ashmead, 41. *Commonwealth v. Williams*, 2 Ashmead, 69. *Kilpatrick v. Commonwealth*, 31 Pennsylvania State, 198, 215. *McDaniel v. The State*, 8 Smedes & Marshall, 401. *Campbell v. The State*, 11 Georgia, 353. *McLean v. The State*, 16 Alabama, 672, 674. *Dunn v. The State*, 2 Pike, 229. *Hill v. The Commonwealth*, 2 Grattan, 594. *Murphy v. The People*, 17 Illinois, 447. *The State v. Freeman*, Speers, 57. *Donnelly v. State*, 2 Dutcher, 464. *The State v. Nash*, 7 Iowa, 347. *The People v. Sauchey*, 24 California, 17. And see *Regina v. Dalmas*, 1 Cox C. C. 95; *Regina v. Scallan, Crawford & Dix Abr. Cases*, 240. *Regina v. Qualter*, 6 Cox

<sup>1</sup> These cases virtually overrule *Rex v. Woodcock*, 1 Leach C. C. 504, tried in 1789, where the question was left to the jury by Eyre C. B.

C. C. 357; *Regina v. Nicolas*, 6 Cox C. C. 120; *Regina v. Megson*, 9 Carrington & Payne, 418.

In *Rex v. Spilsbury*, 7 Carrington & Payne, 187, it was proposed to give in evidence the dying declaration of a deceased person, and it was proved that, about the time of making the declaration, the deceased was asked if he thought he should recover, and how he was; to which he answered that he thought he should not recover, as he was so very ill. He had been previously insensible, but remained sensible for an hour, and died the next day. The evidence was rejected, on the ground that the judge, Mr. Justice Coleridge, did not feel fully convinced that the deceased had no hope of recovering. The learned judge observed, that people very often use expressions to the effect that they shall not recover, who have no conviction that their death is near approaching; and that if the deceased had felt that his end was drawing very near, he should have expected him to say something of his affairs, or of those who were to have his property, or to give some directions as to his funeral, or that he would have used some other expressions, showing a feeling or conviction that his death was at hand. "This decision must, it is conceived, be considered only with reference to the peculiar circumstances of the individual case; but it may properly be regarded as an authority to this extent, that in general the conduct and demeanor of the deceased, and not merely what he says respecting his condition, may be considered for the purpose of determining whether it is proper to receive his declarations." 1 Phillips Ev. (Lond. ed. 1843) 285.

With respect to the interval of time which may have elapsed between the uttering of dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone; nor is it consistent with the principle upon which dying declarations are received in evidence (which, as we have seen, depends upon the state of the declarant's mind) that such declarations should be excluded if not made within any precise limits of time. Unquestionably the length of time may be a material consideration in forming an inference as to the state of mind of the deceased, with respect to his expectation of death at the time of making a declaration, especially if he has not expressed his sense of his own situation.

It is the *impression of impending death*,<sup>1</sup> and not the rapid succession of death in point of fact, which renders the testimony admissible. The law on this point is admirably stated in a recent crown case reserved. "In order," said Chief Baron Pollock, "to render such a declaration admissible, it is necessary that it should be made under the apprehension of death. The books certainly speak of near approaching death; but there is no case in which any particular interval, any number of hours or days, is specified as the limit. In truth, the question does not depend upon the length of interval between the death and declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state." Wightman J.: "The statement must have been made under an impression upon the mind of the person making it that death must in a comparatively short lapse of time ensue; or, to use the

<sup>1</sup> *Regina v. Forester*, 4 Foster & Finlason, 857, where the law, in Mr. Taylor's opinion, seems to be laid down too strictly by Byles J. 1 Taylor Ev. § 648 note. 5th ed. This case is also reported in 10 Cox C. C. 368.

expression found in the books, that his death was impending:<sup>1</sup> that however is a relative term, and does not of course import merely an expectation that the man would die at some time or other—for that is a debt which we all owe to nature—but it means an expectation that he is about to die shortly of the disease or injuries under which he is then suffering; that, in other words, he is without a reasonable or any hope of recovery.” *Regina v. Reaney*, 7 Cox C. C. 209; *Dearsly & Bell C. C.* (1857). “The result of the decisions is,” said Chief Baron Kelly in 1869, “that there must be an unqualified belief in the nearness of death: a belief without hope that the declarant is about to die. We, as Judges, must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution.” *Regina v. Jenkins*, Law Rep. 1 C. C. at p. 192. “The authorities show that there must be *no hope whatever*,” said Mr. Justice Byles in the same case at p. 193. In *Commonwealth v. Cooper*, 5 Allen, 495, the deceased had said to the witness that she could not live, and that she had sent for him to make a request respecting her funeral. Metcalf J.: “We think this satisfactorily shows that her subsequent statement was made under a sense of impending death,—a consciousness that she was near her end.” In *Regina v. Jenkins*, Law Rep. 1 C. C. 187 (1869) the declaration was made on oath to a magistrate’s clerk about thirteen hours before death. The deceased said originally that she had no hope of recovery. The clerk put down that she had no hope. She said in effect when the statement was read over to her: “No, that is not what I said, nor what I mean. I mean that *at present* I have no hope;” which is or may be as if she had said: “If I do not get better I shall die.” The conviction was quashed. In *Rex v. Woodcock*, 1 Leach C. C. 500, 4th ed., the declarations were made two days before death; in *Rex v. Bonner*, 6 Carrington & Payne, 386, three days; in *Regina v. Whitworth*, 1 Foster & Finlason, 382; and in *The State v. Center*, 35 Vermont, 378, six days; in *Rex v. Tinckler*, 1 East P. C. 354, ten days; in *Regina v. Reaney*, *Dearsly & Bell C. C.* 151; 26 Law Journal, M. C. 43; 7 Cox C. C. 209, and in *Rex v. Mosley*, 1 Moody C. C. 97, eleven days; and in *Commonwealth v. Cooper*, 5 Allen, 495, seventeen days; and were all received. In *Rex v. Mosley* and in *Regina v. Whitworth* it appeared that the surgeon did not think the case hopeless, and told the patient so; but the patient thought otherwise. See also *Regina v. Peel*, 2 Foster & Finlason, 21; *Regina v. Howell*, 1 Carrington & Kirwan, 689; 1 Denison C. C. 1.

If it appears that the deceased, at the time of the declaration, had *any* expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterwards, the declaration will be inadmissible. *Rex v. Welbourn*, 1 East P. C. 358.

Where the words were, “I have no hope of recovering, unless it be the will of God,” *Rex v. Murphy*, Irish Circuit Rep. 38, per Richards B.; “I think

<sup>1</sup> The expression in the earlier cases is “almost immediate dissolution.” Hullock B. in *Rex v. Van Butchell*, 3 Carrington & Payne, at p. 631. Bosanquet J. in *Rex v. Crockett*, 4 Carrington & Payne, at p. 544. 1 Greenl. Ev. § 158. See also *Regina v. Forester*, 4 Foster & Finlason, 859, per Byles J.; 10 Cox C. C. 368, s. c. In *Regina v. Peel*, 2 Foster & Finlason, 21, 22, the expression used by Willes J. is “settled hopeless expectation of death.”

myself in great danger," *Rex v. Errington*, 2 Lewin C. C. 148; held insufficient. In *Rex v. Crockett*, 4 Carrington & Payne, 544, notwithstanding a surgeon told the deceased that there was no chance of her recovery, yet, as she said, that she hoped the surgeon would do what he could for her, for the sake of her family, the judge rejected the declarations of the deceased, saying that her expressions showed a degree of hope in her mind. In *Rex v. Fagent*, 7 Carrington & Payne, 238, it appeared that the deceased had expressed an opinion that she should not recover, and after that she made a declaration, but subsequently, on the same day, she asked her nephew if he thought she would "rise again." It was considered that the declaration was not receivable, because the subsequent question showed that she entertained hopes of recovery.

Representations made to the deceased are often of importance in inquiring as to the opinion he entertained of his own danger. In *Welbourn's Case*, who was indicted for the murder of Elizabeth Page, by inducing her to take poison, the declaration of the deceased was made to an apothecary within an hour of her death, in consequence of the apothecary telling her that he must know what she had done, and that she would not live twenty-four hours unless proper relief was afforded. The majority of the Judges were of opinion that the declaration was inadmissible, because the deceased was given to understand that if she told what was the matter with her, she might have relief and recover. 1 East P. C. 358. So in *Rex v. Christie*, 3 Russell on Crimes (4th ed.) 252, where the deceased asked his surgeon if the wound was necessarily mortal, and was told, in answer, that persons had recovered under like circumstances, but that the case was one of extreme danger; a statement made immediately after this conversation was rejected by Chief Justice Abbott and Park J. on the ground that the language of the surgeon was calculated to keep up in the mind of the deceased some expectation of recovery.

In *Rex v. Mosley*, 1 Moody C. C. 27, the deceased received the injury of which he died on the evening of the 30th of September, and died on the evening of the 10th of October following. On the first evening, and every day until his death, he complained to the nurse who attended him that he should never get better. But during his illness he never expressed any opinion, either of hope or apprehension, to his surgeon. The surgeon informed him that his case was hopeless, for the first time, on the morning of the 10th of October. The surgeon did not himself consider the case quite hopeless till that day, and had always previously told the deceased that there was danger, but that there were hopes of his being better. The Judges were unanimously of opinion that the declarations of the deceased, made by him after he was brought home the first evening, after he had said that he should not get better, and also at different times during his illness, and previous to the surgeon's communications to him of his hopeless state, were properly received in evidence. "It may be observed," says Phillips, "that this case is distinguishable from the two preceding, on the ground that there was positive evidence that the conviction of the deceased, as to his own impending death, had not been altered by the representations of the surgeon." 1 Phillips Ev. (London ed. 1843) 288.

In *Rex v. Hayward*, 6 Carrington & Payne, 160, after a surgeon had examined the wound of the deceased, the deceased inquired whether he was in danger; to which the surgeon answered that he was, and that the only chance of his living



was keeping himself quiet; upon which it was contended that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements; but that, upon the surgeon's statement, he must be taken to have had some hope of recovery. On this the Lord Chief Justice observed that any hope of recovery, however slight, existing in the mind of the deceased at the time of making the declarations, would undoubtedly render the proof of such declarations inadmissible. But upon the further examination of the surgeon it appeared that, before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previously to the receiving of his declarations, desired him, as a dying man, to tell the truth; and that the deceased replied he would. Upon this further evidence, the declarations of the deceased were held to be admissible, and were laid before the jury.

"It is worthy of remark," writes Mr. Taylor, "that in Scotland it is immaterial, except as regards the *weight* of the evidence, whether or not the declaration be made under the impression of impending death; but where a party has received a mortal wound, an account of the matter given by him at a time subsequent to the inquiry will be admissible in the event of his death, provided it were made seriously and deliberately, and whilst the deceased appeared to be aware of what he was doing, and in the possession of his faculties." 1 Taylor Ev. § 649, citing Alison Practice Crim. Law, 510-512, 604-607; 2 Hume Comm. 391-393; 1 Dickson Ev. 66, 67. The learned author adds: "The same law seems to have prevailed in England a century ago." See *Rex v. Blandy*, 18 Howell State Trials, 1137.

The declarations of the deceased are admissible only to those things to which he would have been competent to testify, if sworn in the case. See *Oliver v. The State*, 17 Alabama, 587. They must therefore in general speak to facts only, and not to mere matters of opinion. *Rex v. Sellers*, Carrington Crim. Law, 233. And must be confined to what is relevant to the issue. See *Johnson v. The State*, 17 Alabama, 618. It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the validity and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions; *Regina v. Smith, Leigh & Cave* C. C. 607; 10 Cox C. C. 82; 34 Law Journal, M. C. 153; or obtained by pressing and earnest solicitations. *Vass v. The Commonwealth*, 3 Leigh, 786. *Rex v. Fagent*, 7 Carrington & Payne, 238. *Regina v. Whitworth*, 1 Foster & Finlason, 382. But where a statement, ready written, was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was rejected in Ireland, by Mr. Justice Crampton, who observed, that "in the state of languor in which dying persons generally are, their assent could easily be got to statements, which they never intended to make, if they were but ingeniously interwoven by an artful person, with statements which were actually true." And his lordship added: "The magistrate should not have trusted to the relation of a third person, but should have taken down the deceased's declaration from her own lips, or at least have had it taken down in his presence." *Rex v. Fitzgerald*, Irish Circuit Rep. 168, 169.

But whatever the statement may be, it must be complete in itself; and if it appears that the declarations were intended by the declarant to be connected with and qualified by other statements, material to the completeness of the narrative, and that this was prevented by interruption or death, so that the narrative was left incomplete and partial, the evidence is inadmissible. *Vass v. Commonwealth*, 3 Leigh, 787. 1 Taylor Ev. § 651. 1 Greenl. Ev. § 159.

In Massachusetts, it has been decided that this species of testimony may be given by *signs*. *Commonwealth v. Casey*, 11 Cushing, 417. In this case, the declarant, being at the point of death and conscious of her situation, and unable to articulate by reason of the wounds she had received, was asked to say whether the prisoner was the person who had inflicted the wounds, and, if so, to squeeze the hand of the interrogator, and she thereupon squeezed his hand, it was held that this evidence was admissible and proper for the consideration of the jury. The following is the entire opinion of Chief Justice Shaw: "In regard to the admissibility of the signs made by the deceased, in reply to the questions put to her, it is to be observed that all words are signs; some are made by the mouth, and others by the hands. There was a civil case, tried in Berkshire county, where a suit was brought against a railroad company, and the question was, whether a female who was run over survived the accident for any length of time. She was unable to speak, but was asked if she had consciousness to press their hands, and the testimony was admitted. If the injured party had but the action of a single finger, and with that finger pointed to the words 'yes' and 'no,' in answer to questions, in such a manner as to render it probable that she understood, and was at the same time conscious that she could not recover, then it was admissible evidence. It is therefore the opinion of the court that the circumstances under which the responses were given by the declarant, to the questions which were put to her, warrant that the evidence should be admitted; but it is for the jury to judge of its credibility, and of the effect which shall be given to it."

If the witness is unable to state the precise language used, the *substance* of the declarations may be given in evidence. *Montgomery v. The State*, 11 Ohio, 424; *Ward v. The State*, 8 Blackford, 101; and through an interpreter if necessary, *Starkey v. The People*, 17 Illinois, 17. And see *Nelms v. The State*, 11 Smedes & Marshall, 500, 507.

It is no objection to the admission of a dying declaration, that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. Where three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement taken before the magistrate was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received, and Pratt C. J. was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof; but the other Judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third, and evidence of those declarations was accordingly admitted. *Rex v. Reason*, 1 Strange, 499; 16 Howell State Trials, 1, 24 et seq. See *Rex v. Scallan*, Crawford & Dix, Abr. Cases, 340.

In *Rex v. Gay*, 7 Carrington & Payne, 230, Coleridge J. held — though with very questionable propriety, so far as relates to the rejection of parol evidence (1 Taylor Ev. § 651), that if the statement were committed to writing at the time it was made, this writing must be produced, or its non-production accounted for; and that neither a copy nor parol evidence of the declaration can be admitted in the first instance to supply the omission. But as Mr. Greaves remarks “the decisions on this point are altogether unsatisfactory; for there is no authority, by Act of Parliament or otherwise, for taking a dying declaration in writing, and the words uttered by the deceased are just as much primary evidence as any writing in which they may be incorporated.” 3 Russell on Crimes, 269. 4th ed.

In *The State v. Ferguson*, 2 Hill (S. Carolina), 607, 624, the deposition had been read to the dying deponent, and his declaration was, that “it was as nigh right as he could recollect the circumstances.” “If the declaration is taken alone,” said Johnson J., “and unconnected with the deposition, it is unintelligible and unmeaning; but, when taken in connection with it, we have a distinct affirmation of the truth of the contents of the deposition, containing in itself a concise and clear statement of the circumstances under which the mortal wound was inflicted. And that the deposition was admissible follows from the general rule, that declarations are to be taken altogether, and not garbled by suppressing any part of what was said at the time. The contents of the deposition was as much a part of the declarations of the deceased as the words which he uttered. The reading of the deposition itself was admissible, as containing better evidence of the contents than could be supplied by parol; and in *Trowter's Case*, cited in 1 East P. C. 356, parol evidence of dying declarations, which had been reduced to writing, was rejected, on the ground that the writing itself was higher evidence.” And see *Beets v. The State*, Meigs, 106.

If the statement of the declarant has been taken on oath before a magistrate, but is inadmissible as a deposition, by reason of non-compliance with statute requisitions, or for any other reason, *Regina v. Clarke*, 2 Foster & Finlason, 2, it is still admissible as a declaration *in extremis*, if taken under such circumstances as would render such a declaration receivable in evidence. *Rex v. Woodcock*, 1 Leach C. C. 4th ed. 500; 1 East P. C. 356. *Rex v. Dingler*, 2 Leach C. C. 4th ed. 561. *Rex v. Callaghan*, McNally Ev. 365. *The State v. Arnold*, 13 Iredell, 184. And it need not show on the face of it that it was made under circumstances which would render it admissible as a dying declaration; that is a fact *dehors* the statement, and may be proved by parol testimony. *Regina v. Hunt*, 2 Cox C. C. 239.

The dying declarations of the deceased are not only admissible against a prisoner, but also *in his favor*. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better, and afterwards said, “I don't think he would have struck me if I had not provoked him;” Coleridge J. at first expressed some doubt whether he ought to receive the statement, but afterwards received the evidence, observing that it might have an influence on the amount of punishment. *Rex v. Scaife*, 1 Moody & Robinson, 551; 2 Lewin C. C. 150. *Moore v. The State*, 12 Alabama, 764.

It should be observed, that the principles above considered “apply only to

declarations offered on the sole<sup>d</sup> ground that they were made *in extremis*; for where they constitute part of the *res gestæ*, or come within the exception against interest, or the like, they are admissible, as in other cases, irrespective of the fact, that the declarant was under apprehension of death." 1 Greenl. Ev. § 156. Thus the declarations of a person who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, are admissible in evidence, as a part of the *res gestæ*. Commonwealth v. M'Pike, 3 Cushing, 181. Donnelly v. The State, 2 Dutcher, at p. 500. Commonwealth v. Hackett, 2 Allen, 136. See Rex v. Foster, 6 Carrington & Payne, 325; Regina v. Megson, 9 Carrington & Payne, 418, 420; Commonwealth v. Hill, 2 Grattan, 594; Commonwealth v. Densmore, 12 Allen 535; The State v. Shelton, 2 Jones, Law (N. C.) 360.

The following observations on the effect of this species of testimony, in Phillips on Evidence, vol. 1. (London ed. 1843) 292, are worthy of attention: "With respect to the effect of dying declarations, it is to be observed that although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence, to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence therefore is liable to be very incomplete. He may naturally also be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But, it cannot be concealed, animosity and resentment are not unlikely to be felt in such a situation. The passion of anger, once excited, may not have been entirely extinguished, even when all hope of life is lost. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; more especially when it is considered that they cannot be subjected to the power of cross-examination, — a power quite as necessary for securing the truth, as the religious obligation of an oath can be."

The remark often made on verbal statements, which have been heard and reported by witnesses, applies equally to dying declarations; namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding, or from infirmity of memory. In one of the cases upon the subject, this species of evidence is spoken of as "an anomaly, and contrary to all the general rules of evidence, yet as having where it is received the greatest weight with juries." By Coleridge J. in Rex v. Spilsbury, 7 Carrington & Payne, 190. And it cannot be denied that it often has an undue weight with a jury.

When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath,<sup>1</sup> and his declarations as to the cause of his death are considered equal to an oath;

<sup>1</sup> "The rules of receiving evidence in open court are superseded in the case of dying declarations by the solemnity of the occasion." Mellor J. in Regina v. Smith, Leigh & Cave C. C. at p. 621.

yet they are nevertheless open to observation. \* For though the sanction is the same, the opportunity of investigating the truth is very different; and therefore the accused is entitled to every allowance and benefit that he may have lost, by the absence of the opportunity of more full investigation by the means of cross-examination. *Rex v. Ashton*, 2 Lewin C. C. 147, per Alderson B.

“With respect to the effect of dying declarations it is to be observed that, though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight if clearly and distinctly proved, yet it is always to be recollected that the accused has not had the opportunity of cross-examination—a power quite as essential to the eliciting of *the whole* truth, as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of the persons and to the omission of facts essentially important to the completeness and truth of the narrative. It may be added also that the deceased, in many cases, is laboring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator.” 3 Russell on Crimes, 272. 4th ed. “Credit is not always due to the declarations of a dying person,” said Livingston J. in *Jackson v. Kniffen*, 2 Johnson, at pp. 35, 36, “whose body may have survived the powers of his mind, or whose recollection, if his senses are not impaired, may not be very perfect, or who for the sake of ease and to get rid of the importunity and teasing of those around him, may say, or seem to say, whatever they choose to suggest.”

REGINA v. THURBORN.<sup>1</sup>

April 30, 1849.

*Larceny — Finding of Lost Property.*

If a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

A. found a bank-note in the highway, and took it with intent to appropriate it to his own use. The note had no name or mark upon it by which he would know to whom it belonged, nor was there any circumstance attending the finding to enable him to know to whom it belonged. A. changed the note and appropriated the money to his own use, after he knew that it belonged to the prosecutor. *Held*, that he was not guilty of larceny.

THE prisoner was tried before PARKE B. at the Summer Assizes for Huntingdon 1848, for stealing a bank-note.

He found the note, which had been accidentally dropped on the high road. There was no name or mark on it, indicating who was the owner, nor were there any circumstances attending the finding, which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up.

The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note.

The Baron directed a verdict of guilty, intimating that he should reserve the case for further consideration.

Upon conferring with Maule J. they were of opinion that the original taking was not felonious, and that, in the subsequent disposal of it, there was no *taking*, and he therefore declined to pass

<sup>1</sup> 1 Denison C. C. 387. Temple & Mew C. C. 67. 2 Carrington & Kirwan, 831. 18 Law Journal, M. C. 140. 13 Jurist, 499. This case is reported in 3 Cox C. C. 453, and in 3 New Sessions Cases, 581, under the name of Regina v. Wood.

sentence, and ordered the prisoner to be discharged, on entering into his own recognizance to appear when called upon.

On the 30th of April 1849, the following judgment was read by PARKE B. A case was reserved by Parke B. at the last Huntingdon Assizes. It was not argued by counsel, but the Judges who attended the sitting of the court after Michaelmas term 1848, namely, the Lord Chief Baron, PATTESON J., ROLFE B., CRESSWELL J., WILLIAMS J., COLTMAN J. and PARKE B. gave it much consideration, on account of its importance and the frequency of the occurrence of cases in some degree similar, in the administration of the criminal law, and the somewhat obscure state of the authorities upon it. [The Baron here stated the case as before set out.]

In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose; by the term *animo furandi* is to be understood the intention to take, not a partial and temporary, but an entire dominion over the chattel, without a color of right. As the rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him, and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.

In the earliest times it was held, that chattels, which were apparently without an owner, *nullius in bonis*, could not be the subject of larceny. Staunforde, one of the oldest authorities on criminal law, who was a judge in the reign of Philip and Mary, says (bk. I. ch. 16): "Treasure trove, wreck of the sea, waif or stray, taken and carried away, is not felony. *Quia dominus rerum non apparet, ideo cujus sunt incertum est.*" For this he quotes Fitzherbert *Ab. Corone*, pl. 187, 265; these passages are taken from 22 Ass. pl. 99, 22 Ed. III., and mention only "treasure trove," "wreck," and "waif," and Fitzherbert says the punishment for taking such is not the loss of life or limb. The passage in 3 Inst. 108, goes beyond this; Lord Coke mentions three circumstances as material in larceny. First, the taking must be felonious, which he explains; secondly, it must be an actual taking, which he also

explains; and, thirdly, "it is not by trover, or finding;" he then proceeds as follows: "If one lose his goods, and another find them, though he convert them *animo furandi*, to his own use, it is not larceny, for the first taking is lawful. So if one find treasure trove, or waif or stray (here wreck is omitted and stray introduced), and convert them *ut supra*, it is no larceny, both in respect of the finding, and that *Dominus rerum non apparet*." The only authority given is that before mentioned, 22 Ass. pl. 99, 22 Ed. III.\*

Now treasure trove and waif seem to be subject to a different construction from goods lost. Treasure trove is properly money supposed to have been hidden by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the Crown; as to waif, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted, show that they could not be taken from any one, there being no owner. Wreck and stray are not exactly on the same footing as treasure trove and waif; wreck is not properly so called, if the real owner is known, and it is not forfeited until after a year and a day.

The word "estrays" is used in the books in different senses, as may be seen in Comyns's Digest, Waife, F. where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge, after being proclaimed, where the property vests in the Crown, or is grantee of estrays; and also of cattle straying in the manor before they are so forfeited. Blackstone, Vol. II. 561 (Stephen's ed.) defines estrays to be "such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the sovereign."

In the passage in Staunforde no doubt the word is used, not exclusively in the former sense, but generally as to all stray cattle, not seized by the lord. Now treasure trove and waif, properly so called, are clearly *bona vacantia*, *nullius in bonis*, and but for the prerogative, would belong to the first finder absolutely. *Cum igitur thesaurus in nullius bonis sit, et antiquitus de jure naturali esset inventoris, nunc de jure gentium efficitur ipsius domini regis.* Bracton, Corone, Lib. III. ch. 3, p. 120.<sup>1</sup>

<sup>1</sup> All the reporters, with the exception of Denison, give the following passage from Bracton: *Haec quæ nullius in bonis sunt, olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* Bracton, Lib. I. ch. 12, p. 8.



Wreck and stray, in the sense we ascribe to those words, are not in the same situation, for the right of the owner is not forfeited until the end of a year and a day ; but Lord Coke in Constable's Case, 5 Rep. 108 a, treats wreck also as nullius in bonis ; and estrays, animalia vagantia, he terms vacantia, because none claims the property. Wreck and stray however, before seizure, closely resemble goods lost, of which the owner has not the actual possession, and afford an analogy to which Lord Coke refers in the passage above cited.

Whether Lord Coke means what the language at first sight imports, that under no circumstances could the taker of the goods really lost and found be guilty of larceny, is not clear ; but the passage is a complete and satisfactory authority, that a person who finds goods which are lost may convert them *animo furandi* under some circumstances, so as not to be guilty of larceny. The two reasons assigned by him are, that the person taking has a right in respect of the finding, and also that they are apparently without an owner, *dominus rerum non apparet*, *an* owner, or *the* owner does not appear.

The first of these reasons has led to the opinion, that the real meaning of Lord Coke was not that every finder of lost goods, who takes *animo furandi*, is not guilty of felony, but that if one finds, and innocently takes possession, meaning to keep for the real owner, and afterwards changes his mind and converts to his own use, he is not a felon, on the principle that Lord Coke had previously laid down, namely, that "The intent to steal must be when the thing stolen cometh to his possession ; for if he hath the possession of it once lawfully, though he hath *animum furandi* afterwards, and carrieth it away afterwards, it is no larceny ;" and Lord Coke also cites Glanville, *Furtum non est ubi initium habet detentionis per dominium rei*.

It is said therefore that the case of finding is an instance of this — beginning with lawful title, which consequently cannot become a felony by subsequent conversion ; but if it be originally taken not for the true owner, but with intent to appropriate it to his own use, it is a felony, and of this opinion the Commissioners for the Amendment of the Criminal Law appear to have been, as stated in their first report.

This opinion appears to us not to be well founded, for Lord Coke puts the case of lost goods on the same footing as waif and

treasure trove, which are really bona vacantia, goods without an owner, and with respect to which, we apprehend that a person would not be guilty of larceny, though he took originally animo furandi, that is, with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them, and the previous observations have reference to cases in which the original possession of the chattel stolen is with the consent of or by contract with the owner. But any doubt on this question is removed by what is said by Lord Hale, 1 P. C. 506: "If A. find the purse of B. in the highway, and take and carry it away, and hath all the circumstances that may prove it to be done animo furandi, as denying or secreting it, yet it is not felony. The like in taking of a wreck or treasure trove" (citing 22 Ass. pl. 99) "or a waif or stray." Lord Hale clearly considers, that if lost goods are taken originally animo furandi, in the sense above mentioned, the taker is not a felon; and when it is considered that, by the common law, larceny to the value of above twelvecence was punishable by death, and that the quality of the act in taking animo furandi goods from the possession of the owner, differs greatly from that of taking them when no longer in his possession, and quasi derelict, in its injurious effect on the interests of society (the true ground for the punishment of crimes), it is not surprising that such a rule should be established, and it is founded in strict justice; for the cases of abstraction of lost property being of rare occurrence, when compared with the frequent violations of property in the possession of an owner, there was no need of so severe a sanction, and the civil remedy might be deemed amply sufficient. Hawkins, P. C. bk. I. ch. 19, § 3, vol. 1, p. 143, Curwood's ed., says: "Our law, which punishes all theft with death, if the thing stolen be above the value of twelvecence, and with corporal punishment if under, rather chooses to deal with them (e. g. cases of finding, and of appropriating by bailees) as civil than criminal offences; perhaps for this reason, in the case of goods lost, because the party is not much aggrieved where nothing is taken but what he had lost before." It cannot indeed be doubted that if, at this day, the punishment of death was assigned to larceny, and usually carried into effect, the appropriation of lost goods would never have been held to constitute that offence, and it is certain that the alteration of punishment cannot alter the definition of the offence.

To prevent however the taking of goods from being larceny, it

is essential that they should be presumably *lost*; that is, that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore, if a horse is found feeding on an open common, or on the side of a public road, or a watch found apparently hidden in a hay-stack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them, and consequently had no right to treat them as lost goods. In the present case, there is no doubt that the bank-note was lost; the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore though he took it with the intent not of taking a partial or temporary, but the entire, dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation of it to his own use by changing it, with the knowledge at that time that it belonged to the prosecutor, does amount to that crime, will be afterwards considered.

It appears however that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them presumably known by him, by which the owner can be ascertained. Whether this is a qualification introduced in modern times or which always existed, we need not determine. It may have proceeded on the construction of the reason of the old rule, *Quia Dominus rerum non apparet ideo cujus sunt incertum est*, and the rule is held not to apply when it is certain who is the owner; but the authorities are many, and we believe this qualification has been generally adopted in practice, and we must therefore consider it to be the established law. There are many reported cases on this subject. Some where the owner of goods may be presumed to be known, from the circumstances under which they are found; amongst these are included the cases of articles left in hackney coaches by passengers, which the coachman appropriates to his own use; or a pocket-book found in a coat sent to a tailor to be repaired, and abstracted and opened by him. In these cases, the appropriation has been held to be larceny. Perhaps these cases might be classed amongst

those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict. Some cases appear to have been decided on the ground of bailment determined by breaking bulk, which would constitute a trespass, as *Wynne's Case*, 1 Leach C. C. 413, 4th ed.; but it seems difficult to apply that doctrine which belongs to bailment, where a special property is acquired by contract to any case of goods merely lost and found, where a special property is acquired by finding.

The appropriation of goods by the finder has also been held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, checks, or bills, with the owner's name upon them. This subject was considered in the case of *Merry v. Green*, 7 Meeson & Welsby, 623, in which the Court of Exchequer acted upon the authority of these decisions; and in the argument in that case difficulties were suggested, whether the crime of larceny could be committed in the case of a marked article — a check, for instance — with the name of the owner on it, where a person originally took it up, intending to look at it, and see who was the owner, and then, as soon as he knew whose it was, took it *animo furandi*; as, in order to constitute a larceny, the taking must be a trespass, and it was asked when, in such a case, the trespass was committed? In answer to that inquiry, the dictum attributed to me in the report was used; that, in such a case, the trespass must be taken to have been committed, not when he took it up to look at it and see whose it was, but afterwards, when he appropriated it to his own use *animo furandi*.

It is quite a mistake to suppose, as Mr. Greaves has done (Vol. II. p. 14), that I meant to lay down the proposition in the general terms contained in the extract from the report of the case in 7 Meeson & Welsby, which, taken alone, seems to be applicable to every case of finding unmarked as well as marked property. It was meant to apply to the latter only.<sup>1</sup>

“Now the very words,” writes Mr. Greaves, “without any addition to them, were inserted in the last and are retained in the present edition, and they only apply in terms to a check; and, with all deference, they are clearly right as applicable to every check; for a check must at least have the name of the drawer and drawee upon it, and it seems perfectly clear that any person who finds a check, bill of exchange, or promissory note, and converts it to his own use, is guilty of larceny; he must know the owner has not abandoned such

*The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.*

In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

To apply these rules to the present case; the first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to

valuable property, and he must have the means, by the names on the document, of finding those persons, and through them the owner of the check might be discovered; and if, instead of tracing out these persons, he converts the check to his own use, it seems plain that he is just as culpable as the man who finds a parcel with a name on it, and converts it to his own use without any inquiry after the person named. It is clear that *Rex v. Walters*, 2 Russell on Crimes, 169, 4th ed., is a direct authority in support of that view, and I placed the dictum in question immediately after that case, because it was in strict accordance with it, and there I still leave it, as perfectly correct as it stands. In *Regina v. Gardner*, Leigh & Cave C. C. at p. 245, Pollock C. B. said: 'Any one who could read would know to whom the check belonged;' which entirely accords with the view taken in this note. And the dictum of Parke B. in *Regina v. Dixon*, Dearsly C. C. at p. 584, entirely accords also with that view. It is well to add that *Anonymous*, 2 Russell on Crimes, 169, 4th ed., and *Regina v. Walters*, though not cited, were clearly the ground on which the judgment in *Merry v. Green*, was framed, and most likely, therefore, the dictum in question was uttered with reference to those cases." 2 Russell on Crimes, 170 note. 4th ed.

rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is whether that was a felony.

Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it we think, if he had done so knowing who was the owner; for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was punishable, as we have already decided; and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny. We therefore think that the conviction was wrong.

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REGINA v. PRESTON.<sup>1</sup>

November 22, 1851.

*Larceny — Finding of Lost Property.*

Where a bank-note is lost, and is found by a person who appropriates it to his own use: *Held*, that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny.

THE prisoner, Michael Preston, was tried before M. D. Hill, Esq. Recorder of Birmingham, at the last Michaelmas Sessions for that

<sup>1</sup> 2 Denison C. C. 353. 5 Cox C. C. 390.

borough, upon an indictment which charged him in the first count with stealing, and in the second with feloniously receiving a 50*l.* note of the Bank of England.

It was proved that the prosecutor, Mr. Collis of Birmingham, received the note in question with others on Saturday the 18th of October, from Mr. Lidsam, who, before he handed it to the prosecutor, wrote on the back of it the words "Mr. Collis." It was further proved that Collis was a very unusual surname in Birmingham, and almost, if not quite, confined to the family of the prosecutor, the well known master manufacturer.<sup>1</sup>

About four o'clock the same afternoon the prosecutor accidentally dropped the notes in one of the public streets in Birmingham, and immediately gave information of his loss to the police, and also caused handbills, offering a reward for their recovery, to be printed and circulated about the town.

On Monday the 20th, about three o'clock in the afternoon, the prisoner, who had been living in Birmingham fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard any thing of them he would let the police know. He also inquired if the policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o'clock the same afternoon, the prisoner went to the shop of Mr. Bickley in Birmingham, and after inquiring if he (Bickley) had heard of the loss of a 50*l.* note, stated that he the prisoner, thought he knew parties who had found one, and then asked Bickley whether the finders would be justified in appropriating it to their own use; to which Bickley replied that they would not.

At four o'clock on the same afternoon the prisoner changed the note, and was later in the same evening found in possession of a considerable quantity of gold with regard to which he gave several false and inconsistent accounts.

He was then taken into custody, and on the following day (October 21) stated to a constable that when he was alone in his house

<sup>1</sup> There does not appear to have been any evidence that the prisoner could read.

on Sunday, a tall man whom he did not know, came in and offered him a 50*l.* note, for which he (the prisoner) gave him fifty sovereigns.

The police officers had previously told the prisoner, that they were in possession of information that one Tay, who was known to the prisoner, had found the note ; but Tay was not called, nor was any evidence given as to the part (if any) which he took in the transaction.

Upon these facts, the learned Recorder directed the jury, that the important question for them to consider, was at what time the prisoner first resolved to appropriate the note to his own use ; if they arrived at the conclusion, that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time, when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny ; if on the other hand, he had formed the resolution of appropriating it to his own use, before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. He also told the jury, that there was no evidence of any other person having possession of the note after it was lost except the prisoner ; but that even though the prisoner might not be the original finder, still if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use after he knew the owner, or reasonably believed that the owner could be found, he would be guilty of larceny.

The jury found the prisoner guilty upon the first count, and the Recorder requested the opinion of the Judges as to the validity of the conviction. The prisoner was discharged on the recognizance of himself and sureties, to appear and receive judgment at the next sessions.

On the 22d November 1851, this case was argued before LORD CAMPBELL C. J., ALDERSON B., PLATT B., TALFOURD J. and MARTIN B.

*Bittlestone*, for the Crown. *O'Brien*, for the prisoner.

*O'Brien*. The jury found their verdict under the direction of the Recorder, and I submit that that direction was wrong in law. The jury were told that the important question for them to consider, was *at what time* the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion,



that the prisoner either knew the owner, or reasonably believed that the owner could be found *at the time when he first resolved to appropriate it to his own use*, then he was guilty of larceny. But the real question is, whether the prisoner knew who the owner was, or had reasonable means of knowing who was the owner at the time of his taking the property into his possession? Unless at the time of taking it, there was a knowledge or a reasonable means of knowing who was the owner and the *animus furandi*, on the part of the finder, there could be no larceny. This is distinctly laid down in the judgment of Parke B. in *Regina v. Thurborn*, 1 Denison C. C. 387. In the case of *Merry v. Green*, 7 Meeson & Welsby, 623, which was an action for false imprisonment, the question was much discussed, and the difficulty was to find the precise time when the taking became a trespass. The conditions are laid down, in *Regina v. Thurborn*, with great precision. In that case it was found, that when the prisoner picked up the note, he had the *animus furandi*, but had not the means of knowing who was the owner; and it was there held that unless at the time of taking, the finder had an *animus furandi*, and the knowledge or the means of knowing who the owner was, he was not guilty of larceny. In the present case, it is not found by the jury, that the prisoner when he picked up the notes, knew who the owner was, or that he intended to steal them. It may well be that he had originally taken them innocently and “dispunishably.”

ALDERSON B. The Recorder told the jury that even if the prisoner were not the original finder, still if he were the first person who acted dishonestly with regard to the note, he would be guilty of larceny.

O'Brien. There was ample evidence to show that he was not the original finder.

LORD CAMPBELL C. J. The first part of the Recorder's direction is consistent with this, that the prisoner may have received the property honestly, and have kept it for some time for the right owner, and afterwards have yielded to temptation, and appropriated it to himself.

ALDERSON B. When the finder first takes it into his possession,—in order to constitute larceny,—there must be an intention of *taking* it the moment he knows what it is.

PLATT B. There must, at that moment, be a *felonious taking*.

LORD CAMPBELL C. J. If the original possession was a lawful

possession, then there was no asportavit. If the prisoner, when he took the notes originally into his possession, had not the means of knowing who the owner was, and had not then the animus furandi, when was the "taking?"

*O'Brien* cited *Rex v. Leigh*, 2 East P. C. 694; *Rex v. Mucklow*, 1 Moody C. C. 160. *Bittlestone*, for the Crown.

The direction of the Recorder is supported by the judgment of the court in *Regina v. Thurborn*.

LORD CAMPBELL C. J. Do you contend that if the prisoner once had the property honestly in his possession, he would be guilty of larceny by afterwards appropriating it to his own use?

*Bittlestone*. The question cannot be governed by the intention of the finder at the very moment he takes the thing into his possession. There must be time to examine it.

LORD CAMPBELL C. J. Assume that he has full time for examination, and has examined it. The Recorder tells the jury to consider at what time the prisoner first resolved to appropriate it to his own use, and that if, when he resolved to appropriate to himself he had the means of knowing who the owner was, he was guilty of larceny, although he may have before then received it bono animo. When was the taking?

ALDERSON B. The direction of the Recorder does not exclude the supposition that the prisoner might have got the notes honestly, kept them for three or four days, and then resolved to appropriate them to his own use.

*Bittlestone*. I should submit that as long as the prisoner's possession of the property was an innocent one, his possession was that of the true owner. If a person find a bank-note marked, so that it may be traced to the owner, the possession of the finder is the possession of the owner, so long as the finder deals honestly with the property. But as soon as the finder resolves to convert it to his own use he alters the possession, and then can only be said, for the first time, to take the note for the purpose of exercising dominion over it.

ALDERSON B. There is no proof here that the prisoner could read any marks which may have been on the note.

*Bittlestone*. But there is evidence that he took them and showed them to other persons who could read. He went about making inquiries whether he could safely keep them for himself or not.

LORD CAMPBELL C. J. That might have been strong evidence

for the jury that the prisoner originally took the property *animo furandi*, and with the means of knowing who the owner was.

*Bittlestone.* Parke B. lays it down in *Regina v. Thurborn* that the mere taking up of a note to look at it is not a taking possession of the chattel. The taking is when the finder takes it intending to exercise complete dominion over it.

LORD CAMPBELL C. J. Your position is that the finder while he holds the property honestly, holds it for the right owner, and that when he resolves to appropriate it to his own use there is a new taking, and that he then takes it *animo furandi*?

*Bittlestone.* It is laid down in Blackstone's Commentaries, Vol. I. p. 296, ed. Chitty; *Armory v. Delimarie*, 1 Strange, 505, that although the finder of a chattel has a good title to it against all the rest of the world, he has no property or right of possession in a chattel which has been lost, adverse to the owner. The finder has a mere custody of it for the owner; and when he resolves to appropriate it *animo furandi* adversely to the owner, it is submitted that it is larceny.

MARTIN B. Suppose a man takes an article — an umbrella for instance — by mistake, and three or four days afterwards discovers who the owner is, by the name which is upon it, and yet resolves to keep it as his own property, would that be larceny?

*Bittlestone.* I should say so; but this is the case of a fifty pound note. In *Wynne's Case*, 1 Leach C. C. 413, it was held, that if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony if he know the owner, or if he took him up or set him down at any particular place where he might have inquired for him.

ALDERSON B. This differs from a case of bailment, where the tortious breaking bulk determines the bailment. According to the direction of the Recorder, the notes might have passed through a dozen innocent hands before they came to the prisoner who may have got them innocently, and yet the prisoner, he rules, was guilty of larceny.

LORD CAMPBELL C. J. I am of opinion that this conviction cannot be supported. Larceny necessarily supposes a taking *animo furandi*. The rule, as to taking is somewhat technical, but it is not likely to be departed from. In the case before us the direction to the jury is consistent with an honest possession on the part of the prisoner. The Recorder says, that the question for them to

consider was, *at what time* the prisoner first resolved to appropriate the note to his own use. When then was the taking? It is supposed to be a thought which passed through the prisoner's own mind; but I do not think that can amount to a taking, when nothing was in fact done, and when, it may be, that the prisoner was lying in bed at a distance from the article. There is no taking *animo furandi* in this case; consequently, there is no larceny. It is unnecessary for us now to enter further into the question, after the elaborate judgment of my brother Parke on the subject of larceny in *Regina v. Thurborn*.

ALDERSON B. If there must be both a taking and the *animo furandi* to constitute larceny, the difficulty is, how the changing a man's mind, *ex post facto*, can render an honest taking larceny. According to the summing up of the Recorder to the jury, if a man gets a note honestly, keeps it for a week, with an intention of restoring it to the owner, and then changes his mind and resolves to appropriate it to his own use, it may be, as the Lord Chief Justice remarks, while he is in bed, that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law.

TALFOURD J. A mere movement of the mind cannot amount in law to a taking.

PLATT B. The case where there has been a bailment stands on a different principle—that of breaking bulk, but to constitute larceny, in every other case, something must be *taken*, *animo furandi*, and *invito domino*.

MARTIN B. It is of great importance that the rules of the criminal law should be plain and intelligible; and considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny.

In *Regina v. Christopher*, Bell C. C. at p. 33, Williams J. said with reference to *Regina v. Thurborn*: "Agreeing with the decision in that case, I must confess I have never been able to agree with some of the principles there laid down." And again in *Regina v. Moore*, Leigh & Cave C. C. at p. 5: "I concurred in that judgment, but not in some of the reasoning on which it was founded, which, I confess, surprised me." In the last edition of Russell on Crimes, Vol. II. p. 180 (1865), the accomplished editor writes that the judgment in *Regina v. Thurborn* "met with very general disapprobation among criminal lawyers, and has been often questioned since."<sup>1</sup> And in *Regina v. Glyde*, Law Rep. 1 C. C. at p. 144, Martin B. said: "I very much doubt whether the principles laid down

<sup>1</sup> See the very elaborate note in 2 Russell on Crimes, 180. 4th ed.

in *Thurborn's Case* are right; but, as in *Regina v. Christopher*, Bell C. C. 27, so also in this case we are bound by it."

In an admirable judgment in *Regina v. Christopher*, Bell C. C. at p. 34, Hill J. said: "Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shown that, at the time of finding, he had the felonious intent to appropriate the thing to his own use; and this is founded on the rule laid down by Lord Coke, and referred to and acted upon in *Regina v. Thurborn*. The other ingredient necessary is that, at the time of finding, he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner *may* be found; there must be the *immediate* means of finding him." In *Regina v. Moore*, Leigh & Cave C. C. at p. 7, Wightman J. seemed to say that a third ingredient was necessary; viz. that the finder acquired the knowledge of who that owner was before he converted the property to his own use. Blackburn J. in *Regina v. Glyde*, Law Rep. 1 C. C. at p. 143.

It is to be observed in this connection that there is a clear distinction between property lost and property mislaid. In *Regina v. West*, Dearsly C. C. 402, all the Court decided was, that the property was not lost property. Parke B. in *Regina v. Dixon*, Dearsly C. C. at p. 585. *Regina v. Shea*, 7 Cox C. C. at p. 150. In *Regina v. West*, the prisoner was indicted for stealing a purse and its contents. A purchaser at the prisoner's stall left his purse on it. The prisoner's attention was called to the purse by another person, and she treated it as her own and put it in her pocket, and afterwards concealed it. The jury found that the prisoner took up the purse knowing it was not her own and intending to appropriate it to her own use; but that she did not know who was the owner of the purse at the time she so took it. In giving the judgment Jervis C. J. observed: "If there had been any evidence that the purse and its contents were lost property, properly so speaking, and the jury had so found, the jury ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found; but there is in this case no reason for supposing that the property was lost at all, or that the prisoner thought it was lost. On the contrary, the owner having left it at the stall, would naturally return there for it when he missed it. *There is a clear distinction between property lost and property merely mislaid, put down and left by mistake as in this case*, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding therefore does not arise." In *Regina v. Moore*, Leigh & Cave C. C. 1; 8 Cox C. C. 416, the prosecutor dropped a £10 Bank of England note in the prisoner's shop, which the prisoner picked up next morning; the owner missed the note, returned to the prisoner's shop, stated to the prisoner his belief that he had lost it in his shop, and offered him a reward of £3 if he would restore it. The prisoner told him he knew nothing of the note. The findings of the jury brought the case clearly within the doctrines laid down in *Regina v. Thurborn*; for unless the circumstances of the finding are such that the finder is warranted in

believing that the goods are lost, or that the owner could not be found, it is larceny. Here the note was lost in the sense that it was dropped out of the owner's purse; but it was not lost in the sense that the owner did not know where to find it. As soon as the owner discovered his loss, he went at once to the shop and inquired for it. Before a man can appropriate a thing innocently, he must believe it to be lost in the sense that the owner does not know where to find it.

*First. The finder must, at the time of finding, have the intention of feloniously appropriating the property to his own use.*

This is absolutely essential. The very definition of larceny, when carefully considered, necessarily implies this: "In order to constitute the crime of larceny," says Parke B. in the principal case, "there must be a taking of the chattels of another *animo furandi*, and against the will of the owner." There must therefore be a taking *with* (i. e. accompanied with) a felonious intent, and both must exist at the same time. If therefore the finder of lost property carry it home, not then intending to steal it, but afterwards changes his mind, and either sells it or converts it to his own use, intending to keep it, he is not guilty of larceny, however censurable he may be in *foro conscientiæ*. See *Ransom v. The State*, 22 Connecticut, 153; *The State v. Conway*, 18 Missouri, 321. And it can make no difference that, in the interval between the finding and the subsequent appropriation, he actually learns who the owner is. This is distinctly brought out in the first leading case, and other decisions fully sustain the doctrine. One of the most recent and best considered cases on this subject is *Ransom v. The State*, above cited. In that case the defendant found a pocket-book, and money in it, in the public highway, near a hotel. There was no mark upon the property indicating the owner, but the owner, about two hours after the loss, and about the time it was found, made known the fact at the hotel, and offered a reward. The defendant used no means and made no inquiry to ascertain the owner, but concealed the fact that he had found it, and converted the property to his own use. The judge before whom the case was tried, instructed the jury, that if the defendant at the time he found the property, knew or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, or if the defendant at the time he found the property, did not know the owner, still, if he then determined to convert the property to his own use, and to deprive the owner of it at all events, even should he discover the owner before he so converted it, or any part of it, and afterwards concealed the property, and appropriated it to his own use, he was guilty of larceny. The prisoner was convicted under these instructions, but the verdict was afterwards set aside, and the principles laid down at the trial were declared incorrect; mainly, it seems, because the charge withdrew from the jury the question upon which the prisoner's guilt really depended; namely, whether the goods were originally taken by him with a felonious intention, and his guilt was made to depend on an intention which might have been formed subsequently. The conviction was made to depend on the question whether, with a knowledge or the means of knowledge as to the owner, the accused converted the goods to his own use after he first took them; and not upon the question whether, at the time of such taking, he intended so to convert them; and the case of *Regina v. Preston* was cited and approved.

Earlier decisions had either expressly or tacitly proceeded upon the same doctrine. Thus in *Milburne's Case*, 1 Lewin C. C. 251, Bayley J. told the

jury, that in order to convict a prisoner who had taken up a coat left lying upon a stone by the roadside, that "they must be of opinion that, at the time the prisoner took the coat, he did so *animo furandi*." To the same effect is *Regina v. Breen*, 3 Crawford & Dix C. C. 30. In *The People v. Anderson*, 14 Johnson, 294, it was expressly held that the *bonâ fide* finder of lost property cannot be guilty of larceny by any *subsequent* felonious appropriation of it. If by *bonâ fide* finder the court in that case meant that the finder neither knew, nor had the means of ascertaining, the owner at the time of finding, the case is entirely correct, both upon principle and authority. The facts were, that the prisoner found a trunk in the highway, which had fallen from a stage coach. He carried home the trunk, and appropriated the contents. It does not appear that the trunk was marked, or that the finder had any means of ascertaining the owner; if he had, the instruction of the Chief Justice to the jury was certainly right, and the final decision of the case was wrong. The jury were told that if the prisoner first took the trunk with intent to steal, he was guilty of larceny; and, in forming their opinion upon that point, they had a right to take into consideration the subsequent conduct of the prisoner, as well as the other circumstances in the case. The jury found him guilty, and the verdict was set aside by the Supreme Court. The whole argument of the court above rests upon the idea that the fraudulent intent must accompany the taking, which is certainly true, and the judge below ruled precisely in accordance with this principle. But probably the case was rightly decided, as there is no indication that the finder ever knew the owner. Much is said in this and other cases about lost property not being the subject of larceny. If by that is meant such property cannot be stolen, it is entirely wrong. It is as much the subject of larceny as any property, and if the taking and fraudulent intent co-exist with a knowledge of the real owner, the crime is complete. See *Ransom v. The State*, 22 Connecticut, at p. 157; *The People v. Swan*, 1 Parker C. C. at p. 10; *The People v. Kaatz*, 3 Parker C. C. at p. 138.

The courts in Tennessee have erroneously held, in *Porter v. The State*, Martin & Yerger, 226, and in subsequent cases, that a finder of lost property was not guilty of larceny, although he *knew the owner* at the time of finding, because he did not commit a trespass in obtaining possession of it. And the same false reasoning has led the same court to declare it no larceny for A. to fraudulently obtain possession of the property of B. under the pretence of hiring, but really with the then existing intention of stealing it, and afterwards selling it; and this because he obtained possession without a trespass. *Felter v. The State*, 9 Yerger, 297. But both these decisions are certainly anomalous, and contrary to the elsewhere well-established rule of law. See *Tanner v. The Commonwealth*, 14 Grattan, at p. 636; *The State v. McCann*, 19 Missouri, at p. 253.

The principle above laid down, that the felonious intent must exist at the time of finding, is also sustained by well-settled analogies; for if property of A. comes into the possession of B. in any manner, not amounting to trespass, and B. subsequently fraudulently appropriates it, but not having an intention to do so originally, it is not larceny, as many cases establish. Thus where the prisoner saved some of B.'s property from his house which was on fire, and took it home, but the next morning concealed it, and denied all knowledge of it; but the jury having found that she originally took it merely from a desire of saving it for the

owner, and that she had no evil intention until afterwards, all the Judges held this to be no larceny. *Rex v. Leigh*, 2 East P. C. 694. So where a letter was delivered to the prisoner by mistake, it being addressed to the same name as his own, and he opened it, and took out a bill of exchange, without knowing the mistake, but subsequently appropriated it to his own use after he knew it did not belong to him, this was held no larceny, as there was no *animus furandi* when the bill was first received. *Rex v. Mucklow*, 1 Moody C. C. 160. So where A. borrows property for a special purpose, and after that purpose is accomplished neglects to return it, and afterwards disposes of it, this is not larceny, if A. had no felonious intention when he originally took the property. *Rex v. Banks, Russell & Ryan* C. C. 441 (1821), overruling the earlier cases *contra*; and see *Regina v. Steer*, 1 Denison C. C. 349; *Temple & Mew* C. C. 11; 2 *Carrington & Kirwan*, 988; 3 *Cox* C. C. 187. So where property is bailed to a person, to carry or transport, and during the transit he fraudulently appropriates it (not breaking bulk) from a design not conceived until after the bailment commenced, this is not larceny. *Rex v. Reilly, Jebb* C. C. 51. And in like manner where property is delivered to a mechanic to repair, and he receives it without any fraudulent intent, but afterwards resolves to appropriate it, and sells it as his own, this is not larceny. *Rex v. Levy*, 4 *Carrington & Payne*, 241. *Regina v. Thistle, Temple & Mew* C. C. 204; 1 *Denison* C. C. 502; 2 *Carrington & Kirwan*, 842; 3 *Cox* C. C. 575. Or where A. hires a horse with honest intentions, but afterwards sells him from want of money or other cause, and appropriates the proceeds, he is not guilty of larceny. *Regina v. Cole*, 2 *Cox* C. C. 340, per *Patteson J.* and *Coleridge J.* Or where the horse of A. is delivered to B. to be kept, and B. afterwards sells it as his own. *Rex v. Smith*, 1 *Moody* C. C. 473. So where a letter is given to a carrier to carry from A. to B., and he opens the letter on his way, and removes a bank-note enclosed, but delivers the envelope, he is not guilty of larceny, if the jury find he had no intention of stealing the money when it was delivered to him. *Regina v. Glass*, 1 *Denison* C. C. 219.

The reader will of course easily distinguish these cases from those where the original possession was obtained by a *trespass*; for in such case a fraudulent appropriation, although not contemplated until after the property had been some time in the possession of the wrong-doer, is as much larceny as if the felonious intent existed at the reception of the property. *Regina v. Riley, Dearsly* C. C. 149. *Commonwealth v. White*, 11 *Cushing*, 483. *The State v. Coombs*, 55 *Maine*, 477.

We have said above, that the felonious intent must exist at the time of finding, and that if such intention is only an after-thought, no larceny is committed. It may be difficult to say how soon after the finding this intent must take possession of the mind, but we think it should accompany and form a part of the first act of taking. A very delicate application of this principle occurred in *The State v. Roper*, 3 *Devereux*, 473. There the prisoner found a shawl in a promiscuous assembly, and, picking it up in the sight of several persons, placed it where it could be seen, and left it there a few minutes, but leaning his body against it. No one claiming it, he took the shawl from where it hung, secreted it under his coat, and left the company, appropriating the shawl to himself. It was held, that unless the fraudulent intent existed in the prisoner's mind when he first picked



up the shawl, he was not guilty of larceny by the subsequent appropriation of it, even though he knew the owner, or had the means of discovering her when he took the shawl from its place of deposit; because the shawl being in the prisoner's possession from the time he first took it up until he finally carried it away, and, consequently, there being no new taking in the last act, at which time the felonious intent first existed, the two things did not concur in point of time. The principle recognized in the case is clearly right; the application of it to the existing facts may, perhaps, be open to some doubt.

*Secondly. The finder must, at the time of finding, either know the owner, or have the immediate means of ascertaining him, or have reason to believe he can be found. The finder must have acquired the knowledge of who that owner was before he converted the property to his own use.*

In *Regina v. Christopher*, Bell C. C. at p. 32, Channell B. lays stress on the fact that the prisoner had no *immediate* means of discovering the owner. He there says: "In *Regina v. Dixon*, Dearsly C. C. 580, in which *Regina v. Thornborn* was referred to, it was held that, if a man find lost property and keep it, and at the time of finding it have no means, no *immediate* means of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use."

If the finder does know that he can find the owner, and takes away the property *animo furandi*, he is undoubtedly guilty of larceny. *Rex v. Pope*, 6 Carrington & Payne, 346. *The State v. Weston*, 9 Connecticut, 527, where the prisoner, who could read, found a pocket-book in the highway, with the owner's name legibly written upon it in two places. The same principle was considered as beyond question in the case of *The State v. Ferguson*, 2 McMullen, 502, and in *Rex v. Beard*, Jebb C. C. 9. There the defendant found a check payable to Robert King, which he immediately afterwards presented to the bank for payment, declaring that he had received it from Mr. King, which being denied, he then said he received it from some unknown person, with instructions to collect. This was held by all the Judges to be larceny, although the money was not in fact paid to him.

But if there are no marks upon the property, or other indicia by which the owner can be found, the appropriation to the finder's use does not amount to larceny, although he knew the property was not his own. *Regina v. Mole*, 1 Carrington & Kirwan, 417. *Tyler v. The People*, 1 Breese, 227. *The State v. Conway*, 18 Missouri, 321. *The People v. Cogdell*, 1 Hill (N.Y.) 94. *Lane v. The People*, 5 Gilman, 305. And in both the last two cases, it was said the finder was not bound to take any means to discover the owner; he must know him immediately, from marks about the property, or otherwise; for if he ascertains the owner afterwards, and after he has for some time had possession of the property, he is not guilty of larceny, although he meant to keep the property when he first found it. This is clearly involved in the leading case, and in *Regina v. Preston*. And so is the recent case of *Regina v. Dixon*, Dearsly C. C. 580; 7 Cox C. C. 35, where the prisoner found a purse of money in a public place, but which had no mark upon it by which its owner could be known, and although the jury found that the prisoner then believed that the owner could be traced,<sup>1</sup> yet

<sup>1</sup> PARKE B. "Traced" is an ambiguous word. The notes were lost, and the prisoner took possession of them and kept them. If the prisoner had seen them drop from the prosecutor

it was held that he could not be convicted of larceny. And if the finder knows or has the means of knowing the owner, when he finds the article, and does not restore it, or seek to ascertain the owner, but converts the article to his own use, it is not larceny unless he *then* intended to deprive the owner of his property in the goods. Any subsequent fraudulent intention will not complete the crime of larceny. *The State v. Ransom*, 22 Connecticut, 153.

In *Regina v. Glyde*, Law Rep. 1 C. C. 139; 11 Cox C. C. 103, the principle laid down in *Regina v. Thurborn* was carried to its fullest extent. A. dropped a sovereign on a country road during the night-time. She did not stop to look for it, but on the following morning she started to go to the spot in the hope of finding it. In the mean time the prisoner seeing, at the spot where the prosecutrix had dropped her sovereign, a sovereign lying in the road, picked it up, observing that it was a good sovereign, and "would just make his week up." Proceeding on, the prisoner and his companion met A. on her way to the spot where she lost her sovereign. From the conversation which then took place between A. and the prisoner and his companion, the fact that the prisoner had got A.'s sovereign was speedily brought to the prisoner's knowledge; but he denied having found it. Subsequently he was charged with having picked up the sovereign; at first, he denied it, equivocated, and refused to give it up, but on another occasion admitted that he had picked it up. It was decided on the authority of *Regina v. Thurborn* that the prisoner could not be convicted of larceny, for the reason that at the time he picked up the coin, although then intending to appropriate it to his own use, he did not know and had not the means of knowing who the owner was. Some of the Judges expressed an opinion that this was a case of larceny, but as *Regina v. Thurborn* was unreversed, they were bound by it.

If however the finder has reason to believe from the circumstances, or *place where the property is found*, that he knows or can find the owner, and he fraudulently appropriates it, he is guilty of larceny, although there were no marks of ownership on the article itself. *Regina v. Kerr*, 8 Carrington & Payne, 176, where a servant found a roll of bank-notes in a passage of her master's house, and did not inform her master, but denied she had the money. *Regina v. Peters*, 1 Carrington & Kirwan, 245, where the prisoner found some personal jewelry in the prosecutor's garden, and took it away, with intent to appropriate it to his own use. *Lawrence v. The State*, 1 Humphreys, 228, where a barber found a pocket-book on his table, which had been left by a customer, and took possession of it, and, when asked for it by the owner, denied all knowledge of it. And *Regina v. Moore*, Leigh & Cave C. C. 1; 8 Cox C. C. 416; *McAvoy v. Medina*, 11 Allen, 548; and *Regina v. West*, Dearsly C. C. 402; 6 Cox C. C. 415, are precisely similar. *Cartwright v. Cartwright*, 8 Vesey, 406 (1802); 2 Leach C. C. 952, where a bureau was delivered by the owner to a carpenter to repair, and he finding money in a secret drawer, fraudulently appropriated it to his own use. *Merry v. Green*, 7 Meeson & Welsby, 623 (1841) where it was held, that if the purchaser of a bureau finds money secreted in a private drawer, and

or if the notes had had the owner's name upon them, or there had been any marks which enabled the prisoner to know at the moment when he found the notes who the owner was, or that he could be discovered, it might have been within the principles laid down in *Regina v. Thurborn*. Dearsly C. C. at p. 584.

fraudulently appropriates it to his own use, he is guilty of larceny, unless he had reasonable ground to believe that the bureau was sold *with its contents*. The *People v. McGarren*, 17 Wendell, 460, where property was left by mistake in the prisoner's store, and he concealed it, and then denied all knowledge of it. The *State v. McCann*, 19 Missouri, 249, is similar. The *People v. Kaatz*, 3 Parker C. C. 129, where a person found cattle straying in a public highway and drove them to market, with the intention of converting them to his own use. *Wynne's Case*, 1 Leach C. C. 413, 4th ed.; 2 East P. C. 664, where a coachman found a box on his coach, which he must have known belonged to a passenger whom he had carried. *Lamb's Case*, 2 East P. C. 664, is to the same point. So where a servant of a railway company finds the property of a passenger accidentally left in a railway carriage, he is guilty of larceny if, instead of taking it to the station or superior officer, he appropriates it to his own use. *Regina v. Pierce*, 6 Cox C. C. 117. See *The People v. Swan*, 1 Parker C. C. 9, 11. In *The State v. Brick*, 2 Harrington, 530, the Court were of opinion, "that if a person find a package of money lying in a stage coach, which the passengers have just left, and where it can scarcely be said to be lost, bearing on its face the marks of ownership; and with this knowledge of the owner, breaks the seals and feloniously converts the money to his own use, he is guilty of larceny. The breaking of the seals, knowing the owner, is a trespass; and the felonious intent makes it criminal." In each and all these cases, the property taken can hardly be considered *lost* property, but rather property left or mislaid, and therefore the rule of lost property would not apply. In *Pritchett v. The State*, 2 Sneed, 285, the rule was declared to be, that if the owner knows where the property is, so that he would be able to recover the actual possession when he desired, if it had not been removed by the thief, then the property is not lost, and it may be the subject of larceny. See also *Pyland v. The State*, 4 Sneed, 357.

A stranger in a shop who first sees a pocket-book which has been accidentally left by another upon a table there is not authorized to take and hold possession of it, as against the shopkeeper. *McAvoy v. Medina*, 11 Allen, 548. If a person dealing at a bank accidentally leaves an article on a desk in the banking room, and then publishes an advertisement describing it as lost, and promising a reward to the finder upon returning it, another person who while dealing at the bank discovers and takes it is not entitled to the reward upon returning it to the owner, although the desk stood outside of the counters of the bank officers, in an open space accessible to all persons entering the room. *Kincaid v. Eaton*, 98 Massachusetts, 139. Wells J.: "Upon the facts of this case, and the authorities cited (*McAvoy v. Medina*, 11 Allen, 548; *Lawrence v. The State*, 1 Humphreys, 228; *Wentworth v. Day*, 3 Metcalf, 354; *Symmes v. Frazier*, 6 Massachusetts, 345) the plaintiff did not come into possession of the pocket-book in such manner as to give him the special property therein which belongs to the finder of an article lost by the owner. By the terms of the advertisement the reward could be earned only by the return of the pocket-book by one who had entitled himself to those rights by finding. To discover an article voluntarily laid down by the owner within a banking house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article. The occupants of the banking house, and not the plaintiff, were the proper depositaries of an article so left. The plaintiff has not established a legal right to the reward

according to the terms by which it was offered, and therefore cannot retain his verdict."

By statute in some States it is made the duty of finders of lost property to advertise it, or cause it to be publicly cried, &c. Gen. Sts. of Massachusetts, ch. 79. Rev. Sts. of New Hampshire, ch. 139. Rev. Sts. of Connecticut, pp. 624, 625. Rev. Sts. of Vermont, p. 415. And it has been held, that if the finder neglects to do so, and appropriated the property to his own use, he is guilty of larceny. *The State v. Jenkins*, 2 Tyler, 379. And the language of some judges seems to imply, that making search for the owner is a *common-law* duty. Thus in *Regina v. Coffin*, 2 Cox C. C. 44, the common serjeant, after consulting Platt B., ruled it to be larceny if a person finds lost property and appropriates it to his own use, without making endeavors, by advertisement or otherwise to find the owner, although he was utterly ignorant of the owner at the time of the finding; unless he had reason to believe that the property was abandoned by the owner. See also the opinion of Coleridge J. in *Regina v. Reed, Carrington & Marshman*, at p. 307. And the case of *Rex v. —*, 1 Crawford & Dix C. C. 161 note, inclines the same way. But the cases of *The People v. Cogdell*, 1 Hill (N.Y.) 94, and *Lane v. The People*, 5 Gilman, 305, are entirely opposed to that doctrine. And it is very clear that mere neglect to ascertain the owner would not constitute a finder of lost property, which has no marks or indications of the owner's name, guilty of larceny. And see *Ransom v. The State*, 22 Connecticut, 153. In *Regina v. Shea*, 7 Cox C. C. at p. 150 (1856) Lefroy C. J. said: "The dicta, that there is a duty cast upon persons finding property to search for the owner, and that if they do not they are guilty of larceny, are overruled, and properly so. The old law upon this subject, as it is laid down in *Hale* and *Hawkins*, is completely restored and recognized."

Another point to be considered is, what appropriation of the property by the finder is necessary, in order to make the felony complete. The finder may take it away with one of three motives: either to keep it and use it as his own, intending to deprive the owner of it entirely; or, to keep it safely for him and return it when the rightful owner is ascertained; or, lastly, to keep it to see if a reward is offered, and then to return it upon payment of the reward. In the first case, there is no doubt he is guilty of larceny, and in the second it is equally clear he is not. In the latter case it may not be so well settled. In some English cases, it has been considered larceny if the property was taken in order to exact a reward, and was not to be delivered up unless the reward was paid. *Regina v. Spurgeon*, 2 Cox C. C. 102. *Regina v. Peters*, 1 Carrington & Kirwan, 245, by the Recorder after consulting Erle J. On the other hand, in a more recent case, where the verdict was — "We find the prisoner not guilty of stealing the watch, but guilty of keeping it in hope of reward *from the time he first had it*," on a case reserved it was held to be no larceny. *Regina v. York, Temple & Mew* C. C. 20; 2 Carrington & Kirwan, 841; 3 Cox C. C. 181; 1 Denison C. C. 342; and see *Regina v. Breen*, 3 Crawford & Dix C. C. 30. The prosecutor found a check, and being unable to read showed it to the prisoner. The prisoner told him that it was only an old check of The Royal British Bank, and kept it. He afterwards made excuses for not giving it up to the prosecutor, withholding it from him in the hopes of getting the reward that might be offered for it. *Held*, that these facts did not show such a taking as was necessary to

constitute larceny. *Regina v. Gardner, Leigh & Cave* C. C. 243; 9 Cox C. C. 253. And if the finder of lost property, for which a reward has been offered, has a lien on the property for the reward, and is not liable for it in trover, until the loser tenders the reward, as was held in *Wentworth v. Day*, 3 Metcalf, 352; *Wilson v. Guyton*, 8 Gill, 213; *Preston v. Neale*, 12 Gray, at p. 223, there seems to be good reason for the principle, that if property is lost for which a reward is offered, the finder may honestly take home the property, and keep it for the sake of securing the reward, and with a determination not to give it up until the reward is paid, without being guilty of larceny. But suppose lost property is found, and the finder takes it away, intending, if a reward is offered, to return it and take the reward, and if not to keep it, what then, is he guilty of larceny or not? The opinion of the judge, in *Regina v. Spurgeon*, 2 Cox C. C. 102, was, that it was larceny. But see *Regina v. Peters*, 1 Carrington & Kirwan, 245. *Regina v. Breen*, 3 Crawford & Dix C. C. 30.

In cases of this nature where the taking was by *finding*, some of the strongest circumstances to rebut the implication that such taking was felonious, will be those which show that the party made it known that he had found the property, so as to make himself responsible for the value, in case he should be called upon by the owner; or those which show that he endeavored to discover the true owner, and kept the goods till it might reasonably be supposed that the true owner could not be found. 2 East P. C. ch. 16, § 99, p. 605. 2 Russell on Crimes, 187. 4th ed.

*Regina v. Thurborn* and *Regina v. Preston* were followed in *Hunt v. The Commonwealth*, 13 Grattan, 757, and in *Tanner v. The Commonwealth*, 14 Grattan, 635.

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### THE KING *v.* JOHNSON.<sup>1</sup>

Michaelmas Term 1805.

#### *Libel — Evidence of Publication.*

The publisher of a Public Register receives an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the Register; after which he receives two letters in the same handwriting, directed as mentioned, and having the Irish postmark 'on the envelopes; which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed; this is a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the Register in Middlesex for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

THE plea of the defendant, one of the Judges of the Court of Common Pleas in Ireland, to the jurisdiction of this court, having

<sup>1</sup> 7 East, 65.

been overruled upon demurrer, 6 East, 588-702, he pleaded not guilty to the indictment found by the grand jury of the county of Middlesex ; which charged him with the publication in that county of certain libels upon the administration of government in Ireland, and amongst others upon the Lord Lieutenant and Lord High Chancellor of Ireland ; and the trial was had on this day, at the bar of the court by a jury of the county of Middlesex. In the course of the trial, the publication of the libels having been proved to have been made in that county, by insertion of them in Mr. Cobbett's "Weekly Register," which was printed and published in Westminster, the following evidence was given on the part of the Crown to show that such publication was made by the procurement of the defendant. Mr. Cobbett, the publisher of the "Register," proved that before the publication of the libels in his paper, he had received an anonymous letter (the original of which he believed to be destroyed) *in the same handwriting* as the libels which he afterwards received ; in which letter (parol evidence of which was admitted, after objection taken and overruled, to be given for this purpose) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication in his "Register" certain information of public affairs in Ireland ; and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the "Register," Mr. Cobbett, through the medium of the same "Register," requested the promised information to be directed to Mr. Budd, No. 100 Pall Mall, whose shop was at that time used by Mr. Cobbett for the publication of his "Register," where letters of communication were addressed to him, and from whence he received them ; his own house being in Duke Street, Westminster. After this intimation, Mr. Cobbett received in due time two several letters, containing different parts of the libels in question, both in the same handwriting with the letter previously received. Both the letters came under cover, but the covers were believed to be either destroyed or lost, having been thrown aside as useless ; and therefore parol evidence was admitted to prove that they had the Irish postmark upon them, and were directed in the manner pointed out in the "Register." The first of the letters, dated 29th of October 1803, was received and the cover opened by Mr. Budd, who thereupon sent it, together with the cover opened to Mr. Cobbett, in Duke Street, by a person in the office whom the witness did not recollect.

But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbett received the next letter which came to Mr. Budd by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. Cobbett, swore to their belief of their being the handwriting of the defendant, who at the period in question was an Irish judge. It was then proposed by the Attorney General that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. Cobbett for the purpose of being published in his "Register." But previous to their being read, —

*Adam, Park, Lockhart, and Richardson* objected to the reading of the libels, upon the ground that there was no evidence to go to the jury of a publication by the defendant in Middlesex. Admitting, for the sake of argument, that the letters were in the handwriting of the defendant, there was no evidence that he had sent them into Middlesex to be there published; nor any privity established between him and Cobbett the publisher. It was not proved that the envelopes were in the defendant's handwriting; but papers written by him and not intended for publication might have fallen into the hands of another, who transmitted them to Cobbett. The mere circumstance of the envelopes having the Irish postmark upon them could not connect them with the defendant: who was not even proved to have been in Ireland at the time. Neither did it appear that the first letter, which was opened by Budd, who was not called as a witness, was really contained in the envelope which was sent opened with it. The second letter was indeed connected with the envelope, but there was no evidence that either of the papers was received from the post-office, which might have been ascertained by persons employed in that office. If it were urged that the papers themselves contained internal evidence that they were intended for publication, the same might have been urged in the case of the Seven Bishops, where there was clear proof of a publication in Middlesex; for the petition which had been prepared and signed by them at Lambeth in the county of Surry, was found in the king's hands in Middlesex, and was addressed to him; 4 State Trials, 337; and the only link wanted was, that it came there by the agency of the bishops; 4 State Trials, 344, 345; which was holden not to be supplied by the evidence of their acknowledgment of their handwriting in that county; 4 State Trials, 345–349,

360-365; in consequence of which Lord Sunderland was afterwards called to prove the delivery of it by the bishops to the king in Middlesex.

The *Attorney General*, *Solicitor General*, *Erskine*, *Garrow*, *Wood*, and *Abbott*, for the Crown, were stopped by the Court.

LORD ELLENBOROUGH C. J. Nothing which falls from the Court will overrule or tend to shake that which was soundly ruled in the case of the Seven Bishops, where the only evidence at first relied on was of a confession by the defendants, extorted as it was, of their having owned in Middlesex their signatures to the petition which had been prepared and signed in the county of Surry; but there was no evidence of any publication of the libel, as it was then called (though it was nothing more than a decent and humble petition of those reverend persons to the king) in the county of Middlesex, until Lord Sunderland was called, who gave evidence of a publication of the paper in that county proper, to be left to the jury. But here there is no question of the fact of publication by Mr. Cobbett in Middlesex of that which is admitted to be a libel; and the only question is, Whether the defendant were accessory to that publication? For if he were, the offence is established. For one who procures another to publish a libel is, no doubt, guilty of the publication, in whatever county it is in fact published in consequence of his procurement. Now material evidence of the fact of such procurement may be collected from the papers themselves, as they have been opened by Mr. Attorney General, which papers, as the proof at present stands, are in the handwriting of the defendant; and are said to answer the description of those which Cobbett had been previously desired to publish, and which papers came to his hands through the medium pointed out by him in his "Register." How then can we be called upon to pronounce that there is no evidence to go to the jury of such procurement before we have heard read the papers themselves? I am therefore of opinion that we are bound in duty to receive the evidence.

GROSE J. concurred in the same opinion.

LAWRENCE J. The case of the Seven Bishops does not apply to the present. Before Lord Sunderland was called, the only evidence against the defendants was of a confession by them in Middlesex



of their handwriting to a paper which was shown them, which was stated to have been written in Surry ; but that was no evidence of a publication by them in Middlesex. But here there is clear proof of a publication in Middlesex by Cobbett, and the only question is, Whether this were done by the procurement of the defendant ? Then after it has been proved by the witness that he received a notification by letter that he should have papers of a certain description sent to him to publish, if he would undertake to publish them, to which he had given a public answer in his " Register " in the affirmative, directing to whom the papers should be sent ; and when afterwards, in consequence of that communication, he receives papers through the channel pointed out by him, papers which are proved to be in the handwriting of the defendant (as it stands at present), and answering, as they are said to do, the description of those before notified to him as intended for publication, must not the papers themselves be read ? and is there not evidence to go to the jury for them to decide whether the papers were sent by the defendant or by some other person ?

LE BLANC J. delivered his opinion to the same effect ; and added, in answer to the objection that there was not strict evidence of a delivery of the letters by the post to Mr. Cobbett, that it was not material for the decision of the present question, how the letters came to Mr. Cobbett, whether by the post or a private hand ; that was matter of observation to make to the jury.

The libels were then read at length, and in addition to the libellous matter charged, contained various expressions declarative of the author's intention to have them published in the " Register ; " and the latter paper contained an acknowledgment of the publication of the former part of the correspondence.

The defendant afterwards called witnesses to disprove the handwriting, and went to the jury upon the fact that the libels were not in his handwriting ; but after a trial of some length, the jury found a general verdict of guilty.

In Lamb's Case, 9 Rep. 59 b, it was resolved that " every one who shall be convicted, either ought to be a contriver of a libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel ; for if one reads a libel, that is no publication of it, or if he hears it read, it is no publication of it, for before he reads or hears it he cannot know it to be a libel ; or if he hears or reads it, and laughs at it, it is no publication of it ; but if after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or

after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel; for every one who shall be convicted ought to be a contriver, procurer, or publisher of it, knowing it to be a libel. But it is great evidence that he published it, when he, knowing it to be a libel, writes a copy of it, unless afterwards he can prove that he delivered it to a magistrate to examine it; for then the act subsequent explains his intention precedent."

This seems far more reasonable than the opinion of the Judges in *Rex v. Paine*, 5 Modern, 163, where it was laid down that "if one repeat and another write a libel, and a third approve what is wrote, they are all makers of it."<sup>1</sup> Although in this last case the court were of opinion that the making a libel is an offence, though never published, it is now well established that merely writing a libel is no offence unless it be published; i. e. communicated to the public or some person.

"It is remarkable," say the English Criminal Law Commissioners, in their Sixth Report, p. 61, "that the question whether the mere composing and writing a libel be sufficient to constitute a crime, without any actual publication, does not appear to have ever been completely settled. It was one much discussed in *Sir Francis Burdett's Case*, 4 Barnewall & Alderson, 95 (1820), but as there had in that case been a publication, although some doubt existed whether it could be regarded as a publication within the county in which the offence was alleged to have been committed, the abstract question whether the mere act of composing and writing a libel, without any publication, was not decided."<sup>2</sup> After having investigated the subject with great attention, we have not been able to attain to the conclusion that the offence was ever deemed to be complete at common law without some publication. The law of libel, as received in the ordinary criminal courts, was undoubtedly an emanation from the Court of Star Chamber. The doctrine of the Star Chamber was borrowed from the Imperial Law of Rome, concerning the *libellus famosus*, to which the libel of the English law was supposed to bear a close resemblance. After having diligently examined these sources, as well as the modern decisions said to be founded upon them, we have not discovered any authority which we have deemed sufficient to warrant us in including this offence in the digest. It will be seen from our digest that even the statute law is not uniform on this point. Some offences are made to consist simply in composing and writing, or printing; whilst in others publication is essential to the crime."

But notwithstanding a libel may be written with a real intent to publish it, says Deacon, yet if no publication of it ever takes place, the question seems to admit of no doubt. For whatever a man's intent may be, if such intent is followed by no overt act to accomplish his purpose, it would be difficult to say that he is deprived of all *locus pœnitentiæ*, and may be indicted for what he only intended, but never in fact attempted. The writing and composing a libel, without any thing further done, may be considered merely as the private registering of a man's own thoughts; and as it is the publication that is the gist of the

<sup>1</sup> This language is different from that reported in Carthew, 405. The report in fifth Modern is dated 7 Wm. III. and concludes with the words "sed adjournatur." The report in Carthew is dated 9 Wm. III.

<sup>2</sup> Mr. Justice Holroyd expressed an opinion upon the abstract proposition in the affirmative.

offence, it seems reasonable at all events, to require some evidence of an actual attempt to publish, before a party can be charged with an intent to do so. 2 Deacon Crim. Law, 809.

The publication of a libel is not confined to the actual communication of its contents by the publisher to some other person; for though, in common parlance, the word "publication" may be confined in its interpretation to making the contents known to the public, yet its meaning is not so limited in law; wherein some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus in the language of the law, we speak of the publication of a will, and of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. So in the case of a libel, the publication of it may be traditione, when it is delivered over to scandalize the party, 5 Rep. 126 a; <sup>1</sup> *and the publication of it is nothing more than doing the last act for the accomplishment of the mischief intended by it.* For the moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end then of the locus penitentiae, the injuria is complete, the mischievous intention is consummated, and from that moment the libeller may be called upon to answer for his act. And though the act of publication may be proved by an actual communication of the contents of the libel, as by singing or reading, or an open exposure<sup>2</sup> of it to other persons, yet these are not the only nor the usual modes of proof. The usual mode is by delivery of the libel, either by way of sale, or otherwise; and upon proof of the purchase of a pamphlet in Fleet Street, it is not necessary to prove that the purchaser read the pamphlet either in London or elsewhere. Best J. and Abbott C. J. in *Rex v. Burdett*, 4 Barnewall & Alderson, at pp. 126, 160. 2 Deacon Crim. Law, 808. *Swindle v. The State*, 2 Yerger, 581. A libel may be published by transmission through the electric telegraph; as in a case where a message was sent from one railway station to another, to the effect that a certain bank had stopped payment. *Whitfield v. The South Eastern Railway Co. Ellis, Blackburn & Ellis*, 115.

*The making of a libel known then in any mode to the party libelled, or to any other individual, amounts indisputably in law to a publication of the libel.*

In the case of *The King v. Paine*, 5 Modern, 163, if correctly reported, the delivery of a defamatory paper by the writer, to an individual, *by mistake* for another paper, is said to have been held not to be a publication. But a defendant has been held liable in an action for the publication of a libel which by mistake was directed and posted to the defendant's employer instead of to the plaintiff himself. *Fox v. Broderick*, 14 Irish Common Law Rep. 453.

A person who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may

<sup>1</sup> "So that the mere delivering over or parting with the libel with that intent, is deemed a 'publishing.' It is an *uttering* of the libel, and that I take to be the sense in which the word 'publishing' is used in law." Holroyd J. in *Rex v. Burdett*, 4 Barnewall & Alderson, at p. 148.

<sup>2</sup> The sale of an obscene print to a person in a private room, he having requested that such print should be shown to him, his object being to prosecute the seller, is a sufficient publication. *Regina v. Carlisle*, 1 Cox C. C. 229.

have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery; and its legal character is not altered, either by the procurement of that person, or by the subsequent handing over of the writing to him. *Brunswick v. Harmer*, 14 Queen's Bench, 185. But the reading a libel in the presence of another, without any previous knowledge of its being a libel, does not amount to a publication. "Also it hath been holden," says Hawkins, "that he who repeats part of a libel in merriment without malice, and with no purpose of defamation, is in no way punishable;<sup>1</sup> but it seemeth that the reasonableness of this opinion may justly be questioned; for jests of this kind are not to be endured and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it." 1 Hawkins P. C. ch. 28, § 14, ed. Curwood. Yet, where a man went to the defendant's house and requested liberty to see a caricature print, and the defendant thereupon produced it, and pointed the figures of the persons it ridiculed, Lord Ellenborough ruled that this was not sufficient evidence of a publication. *Smith v. Wood*, 3 Campbell, 323.

Evidence that the defendant communicated verbally to another the defamatory matter with a view to its publications, is sufficient to charge him with the publication. In *Adams v. Kelly, Ryan & Moody* N. P. C. 157, a witness (at that time a reporter for a newspaper called "The Observer") stated that he had met with the defendant, who communicated to him the slanderous matter set forth in the first count relating to the plaintiff, which the defendant said would make a good case for the newspaper. The reporter, desirous of obtaining information for his paper, attended the defendant to an adjoining tavern, who gave him a more detailed account, for the express purpose of inserting it in the paper with which the reporter was connected. Afterwards, from the particulars communicated by the defendant, the reporter drew up an account which he left at the office of "The Observer," to be inserted in that paper. A copy of "The Observer" was then put into the witness's hands, and he stated that a paragraph in that paper contained exactly the same account which he sent to the editor, with the exception of some slight alterations, not affecting the sense, made by the editor. The counsel for the plaintiff then proposed to read the newspaper. Abbott C. J.: "This newspaper is proposed to be given in evidence, in order to sustain that count which charges the defendant with publishing the printed libel set forth in the declaration. The evidence is, that the reporter put something in writing from his conversation with the defendant, and which he gave to the editor. What the reporter published in consequence of what passed with the defendant, may be considered as published by the defendant; but you must show that what was published is that which was given to the editor by the reporter, which you can only do by producing the paper itself."

The defendant was indicted for causing to be published in a newspaper a libel which told a story of the prosecutor, and added comments on the story, giving it a ludicrous character. The editor of the newspaper stated that the defendant had expressed a wish to him that he would "show up" the prosecutor, and had told him the story. The witness communicated it to a reporter for the paper,

<sup>1</sup> Bacon Ab. Libel, B. 2. 1 Russell on Crimes, 355 and note. 4th ed.

and the libel was substantially what was so communicated. Before the publication the defendant remarked to the witness that the article had not yet appeared. After it had appeared, the defendant told the witness that he had seen it, and that he liked it very much. The witness had heard the story before the defendant told it him. The Court of Queen's Bench held, that on this evidence the jury might find that the defendant authorized the publication of this particular libel, notwithstanding the comments added, as there was both a general authority to publish, and an approval of the particular publication. *Regina v. Cooper*, 8 Queen's Bench, 533. Lord Denman C. J. said: "If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request; he contributes to a misdemeanor, and is therefore responsible as a principal." . . . "I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state."

It seems that there may be a *constructive* publication. In *Watts v. Fraser*, 7 Carrington & Payne, 369, it was held that the printer and editor of a magazine are both liable for a libellous lithographic print which is contained in the work, although the print was not struck off by the printer, provided that the print is referred to in the letter-press of one of the articles.

The mere act of *printing* is not sufficient evidence of publication. In *Watts v. Fraser*, 7 Adolphus & Ellis, 223, 233, Lord Denman C. J. in delivering the opinion said: "One authority, *Baldwin v. Elphinston*, 2 Wm. Blackstone, 1037, was cited, where the Court of Exchequer held, that printing must *primâ facie*, be understood to be a publishing, because the matter must be delivered to a compositor and other workmen; but it does not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workmen. We cannot therefore act upon that case." If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is sufficient evidence to go to a jury that it was published by the defendant, although there be no evidence to show that the printing and publishing were by his direction. *Regina v. Lovett*, 9 Carrington & Payne, 462. Little Dale J. "For when a libel is produced written by a man's own hand," said Lord Holt, "and the author of it is not known; he is taken in the mainer,<sup>1</sup> and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him." *Rex v. Beare*, 1 Lord Raymond, at p. 417; 2 Salkeld, 419. But it is not a publication, if the author takes a copy of the libel, provided he never publishes the copy. *Lamb's Case*, 9 Rep. 59. *Comyns's Digest*, Libel, B. 2.

If the libel is contained in a *letter* addressed to the party, and delivered into his hands, this is evidence of a publication sufficient to support an indictment,<sup>2</sup>

<sup>1</sup> A man was taken with the mainour, mainouvre, when he was taken with the thing stolen in his possession, or, as it was termed in the ancient indictments, *captus cum manu opere*. Cowell thus explains it: "Mainour, alias manour, alias meinour, from the French manier, i. e. manu tractare in a legal sense denotes the thing that a thief taketh or stealeth; as to be taken with the mainour is to be taken with the thing stolen about him." *Law Dictionary*, ad verb. "Mainour." In "The First Part of Henry IV." Prince Henry exclaims:—

"O villain! thou stolest a cup of sack eighteen years ago, and wert taken with the manner." Act II. Sc. 4.

<sup>2</sup> A further publication is necessary to support an action. *Chutterbuck v. Chaffers*, 1 Starkie N. P. C. 471.

on the first and general principle of preserving orderly and decent conduct in society, that is, technically speaking, for the preventing breaches of the peace. 1 Hawkins P. C. ch. 28, § 11, ed. Curwood. Therefore the indictment must allege that the intention of sending the letter was to provoke the prosecutor, and to excite him to break the peace. *Rex v. Wegener*, 2 Starkie N. P. C. 245. *Hodges v. The State*, 5 Humphreys, 112. On the trial of an indictment for libel the only evidence of publication was the sending it in a letter addressed to the prosecutor himself, and the receipt of it by him. Held, that there was sufficient evidence to go to the jury, although the indictment contained no allegation of an intent or a tendency to provoke a breach of the peace. *Regina v. Brooke*, 7 Cox C. C. 251.

A sealed letter or other communication delivered to a *wife*, is a publication within the meaning of the law. A libel respecting a husband published abroad, may never reach the ears or eyes of his wife. But such a communication made directly to the wife is an attempt to poison the fountains of domestic peace at their very sources. *Schenck v. Schenck*, Spencer (N. J.) 208. *Wenman v. Ash*, 13 Common Bench, 836. And where a letter containing a libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties. *Rex v. Wegener*, *ubi supra*, per Abbott J. In *Avery v. The State*, 7 Connecticut, 266, the information charged that the defendant sent a letter to the wife of another man, stating that she had acted libidiously with him, and had invited him to an adulterous intercourse and connection with her, and sought opportunities to effect it, and that the defendant wrote the letter and sent it to her, with intent to insult and abuse her, and to seduce and debauch her affections from her husband, entice her to commit adultery, and bring her into hatred and contempt. It was held that the sending of such a letter, without other publication, was sufficient to support the information on the general principle that it tended to cause a disturbance of the public peace.

The date of a letter is *prima facie* evidence that it was written at the place where it was dated. *Rex v. Burdett*, 4 Barnewall & Alderson, 95. And the postmark is *prima facie* evidence that the letter was in the office at the time and place therein specified. *Rex v. Plumer*, Russell & Ryan C. C. 264. *Fletcher v. Braddyll*, 3 Starkie N. P. C. 64. And if a letter properly directed is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed. Thus if a letter containing a libel is produced at the trial with a postmark upon it, and with the seal broken, this is sufficient *prima facie* evidence of a publication to the party to whom it is addressed. *Warren v. Warren*, 1 Crompton, Meeson & Roscoe, 250; 4 Tyrwhitt, 850; approved in *Shipley v. Todhunter*, 7 Carrington & Payne, 680, 686. In *Callan v. Gaylord*, 3 Watts, 321, it was held that the depositing a libellous letter in the post-office, where it was mailed and despatched, together with its production, with the postmark upon it, by the plaintiff, at the trial, is sufficient evidence of its publication. Gibson C. J. in delivering the opinion of the court said: "The fact that the letter was put into the post-office raised a natural presumption, founded in common experience, that it reached its designation by the regular operations of the mail. . . . The depositing of the letter in the post-office would be a publication of it, though it never came to the hands of him for whom it was

intended, if it came to those of any one else, because a wrong-doer is answerable for all the consequences of his acts. It was proved to have been put into the post-office by some one; and that it was taken out by some one, is shown by the production of it at the trial; it consequently owes its publicity to the writer."

If the libel be published in a *newspaper*, proof that copies were distributed, and that the clerk of the printer received payment for them, is evidence of publication. *Respublica v. Davis*, 3 Yeates, 128. And the delivery of a copy to the officer at the stamp-office, *Rex v. Amphlit*, 4 Barnewall & Cresswell, 35; and payment to him for the duties on advertisements in the paper in question, *Cook v. Ward*, 6 Bingham, 409; have each been held evidence of publication. Where a witness testified that he was a printer, and had been in the office of the defendant where the paper in question was printed, and he saw it printed there, and the paper produced was he believed printed with the types used in the defendant's office; this was held to be *prima facie* proof of publication by the defendant. *Southwick v. Stevens*, 10 Johnson, 443.

In *Gathercole v. Miall*, 15 Meeson & Welsby, 319, the question, what is sufficient evidence to go to a jury of a publication of a newspaper was discussed as follows by Alderson B. "The question is, whether or not there is reasonable evidence that this is a copy of the individual paper which has been produced, and which has been shown to have been published by the defendant. Now we must consider what the nature of the instrument is. It is a copy of a newspaper. We must use our own common sense, and remember that with respect to newspapers, not one copy, but a great variety of copies, are published for general circulation among the public at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials, and from the same type. Suppose I were to have a copy of Meeson and Welsby's Reports here, and Meeson and Welsby's Reports in the Queen's Bench, and Meeson and Welsby's Reports in the Common Pleas, and I were to examine those three books, and to find that there was a misprint in the first page, and a misprint in the fortieth page, and a misprint in the sixty-third page, I should say a jury might very reasonably infer that those three books were printed from the same types. So I say here with respect to a newspaper; if you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced; and if so, it is printed by the defendant; and if so, the defendant is responsible for the extent of the injury which may be done by that paper, which by some means has come out of his possession, and which the jury may infer that he, or somebody connected with him, was the person who transmitted it to the Chatteris Book Society."

In an action for a libel contained in a pamphlet, a witness stated that she had received a copy from the defendant; and that she had read certain portions of it; that she had lent it to a third person, who had afterwards given her a copy back, which she *believed* to be the same she had lent to him, but that she would not swear that it was the same, yet that she had no reason to doubt it. This was held to be sufficient evidence of publication for the jury. *Fryer v. Gathercole*, 4 Exchequer, 262. Pollock C. B.: "It appears to me that the question is resolved into one of *degree* only. When the circumstances of the case are examined, it appears that the witness could with propriety say no more than this:

‘I believe the pamphlet produced to be the same as that I received from the defendant, because I received it from the person to whom I had lent it, and for this reason I expected to receive the same back again; and I had no reason to think it was not, although I cannot possibly identify it.’ If she had put her name upon it before the witness had lent it, there would have been no doubt about the matter; but here she did so after it was returned. Independently of this fact therefore the question is, whether there is any evidence that the copy she had received back was the identical copy given to her by the defendant. My brother Alderson has put several hypothetical cases in the course of the argument, by way of illustration. Now, without considering the case of coin, let us suppose the case of a copy of a book, — a book which is extremely scarce, as for instance, one of which only two or three copies exist, — and suppose a person from the British Museum were to be called as a witness, and he were to say: ‘Mr. A. B. asked for the work the other day, and it was lent him, and he had it in his possession for some time, and he returned *this* one to me. I believe this to be the same work he received, but I will not pledge my oath to its being so. There are but two other copies of the work, one at Paris, the other at Vienna.’ Such a circumstance would exclude almost all possibility that the work returned was not the same. Now, suppose that a few other copies of the work existed, still there would be some evidence to go to the jury of the identity of the book. The evidence would be weaker. If a solitary copy only existed, the copy returned could not but be the same, and in that case the evidence must have been received. If there were twenty copies, the probability of its identity would be less; and so if there were five hundred, less still; and so on. In addition to this, the more frequently the party lends it, the probability becomes less that the one returned is the same with that lent; but of that probability the jury are not to be the judges. It therefore appears to me that when the matter is carefully examined, it comes to a mere question of degree or weight; but still there is some evidence for the jury. If there were some legal evidence to go to the jury in this case, there is no doubt that they were justified in their verdict; and as there was some evidence to go to the jury, and the objection, if any, was to the weight of it, the work was properly received.”

The publication must be proved to have been made within the county laid in the indictment. The Case of the Seven Bishops, 12 Howell State Trials, 354. Where a libel was published in a newspaper printed in the State of Rhode Island, but which usually circulated in a county in Massachusetts, and the number containing the libel was actually circulated in such county, it was held that this was conclusive evidence of a publication in such county. *Commonwealth v. Blanding*, 3 Pickering, 304.

If a libel is written in one county, and sent by post, addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county. The Case of the Seven Bishops, 12 Howell State Trials, 331, 332. Thus if a libellous letter is sent by the post, addressed to a party out of the county in which the venue is laid, but it is first received by him within that county, this is a sufficient publication. *Rex v. Watson*, 1 Campbell, 215.

The delivery at the post-office in L. of a sealed letter, enclosing a libel, is a publication of the libel in L. And where a person writes and composes a libel



in one county, with intent to publish, and afterwards publishes it in another, he may be indicted in either county. *Rex v. Burdett*, 4 Barnewall & Alderson, 95. In this case, it appeared that the defendant, on the 22d of August, wrote and composed a libel in the county of L., and that he was seen in L. on that and the following day, and on the 24th the libel was delivered in the county of M. (100 miles off) by A. to B., being enclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open, and it was not proved that there was on it any trace of a seal or postmark. A. was not called on the trial as a witness by either party, nor was it proved that he was a resident, or had been about that time in L. Under these circumstances, it was held by a majority of the Judges in the King's Bench, that this was evidence on which a jury might properly be left to presume that the libel was delivered open to A. in L. It was also held in this case, that where it is proved that a defendant writes a libel in one county, and sends or carries it to some person, or to some place (without proving to whom, or to what place in particular, it is so sent or carried), for the purpose of publication in another county, and the libel is in fact afterwards published, this is evidence that the defendant published it in the county where it was written. For the sending or carrying the libel for such purpose was considered to be the commencement of the publication, of which the receipt and reading of it by the person (wherever he was) to whom it was so sent, was the consummation. 4 Barnewall & Alderson, at p. 176, per Lord Tenterden C. J.

A general confession, that the defendant was the writer of a libel, is no evidence that he published it in any particular county. The Case of the Seven Bishops, 12 Howell State Trials, 183. And see the observations on this celebrated case by Lord Ellenborough, and Lawrence J. in the text, ante p. 435.

The general rule is, that the identical libel published must be produced. But where it is in the prisoner's exclusive possession,<sup>1</sup> or has been lost or destroyed, and perhaps in some other cases, where its production is out of the power of the prosecutor, then as in other cases secondary evidence is admissible of its contents. In *Johnson v. Hudson and Morgan*, 7 Adolphus & Ellis, 233, it appeared that the alleged libel had been published by being sung in the streets; that Morgan had printed 1000 copies of a song, of which 300 had been delivered at Hudson's shop; that the song complained of had been sung from a printed paper received of Hudson, and taken at Hudson's shop from a parcel containing about 300, and that it had since been destroyed, but the person who sung it swore that it corresponded with a printed song which was produced, and which had Morgan's name on it, as printer; and one of Morgan's journeymen swore that the printed song produced corresponded with that which Morgan had printed and delivered to Hudson. It was held that there was sufficient secondary evidence to go to a jury of Morgan's having printed the paper from which the publication took place. Where a witness testifies that he is a subscriber for a certain newspaper, and being shown several papers of the same name and date, further testifies that the papers are in all respects similar to those left at his office, that the articles contained in the papers produced are the same that he had read in the copies left at his office; this was held to be sufficient proof of publication, without

<sup>1</sup> In which case, notice to produce must be given before parol evidence can be given of its contents. *Winter v. Donovan*, 8 Gill, 370.

proving a loss of the papers originally left at the office. *Huff v. Bennett*, 4 Sandford, 120.

In *Gathercole v. Miall*, 15 Meeson & Welsby, 319, this rule was fully and learnedly discussed. This was an action brought by the plaintiff, the clergyman of a parish, for a libel published in a newspaper called "The Nonconformist." It was sought to prove that one of such newspapers had been sent to a public reading-room in the plaintiff's parish, to which there were eighty subscribers. The president of the reading-room testified, that a newspaper called "The Nonconformist," which was the name of that published by the defendant, was brought to the institution, he did not know by whom, and left there gratuitously; that about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it was lost or destroyed. The learned judge under these circumstances held that secondary evidence of the contents of the paper was admissible. Alderson B.: "It is clear as it seems to me that the evidence was properly received. I think the search should be such as should induce the judge to come to the conclusion, and the court afterwards, on revising his opinion, to come to the same conclusion, that there is no reason to suppose that the omission to produce the document itself arose from any desire of keeping it back, and that there has been no reasonable opportunity of producing it which has been neglected. Now, the question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case in the course of the argument of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope, in which a letter had been received, and a person said, 'I have searched for it among my papers — I cannot find it;' surely that would be sufficient. So with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.' then I should have said, you ought to go to A. B. and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children, of the members; and where will you stop? As it seems to me the proper limit is where a reasonable person would be satisfied that they had *bonâ fide* endeavored to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper."

THE QUEEN *v.* GOODHALL.<sup>1</sup>

1846.

*Abortion — Indictment.*

Indictment under St. 1 Vict. ch. 85, § 6, for using an instrument with intent to procure miscarriage. *Held*, immaterial whether or not the woman was pregnant at the time the instrument was used.

THE prisoner was indicted before Mr. Justice Coltman, at the Spring assizes for Nottingham, upon the St. 1 Vict. ch. 85, § 6, for using a certain instrument with the intent to procure the miscarriage of a woman named Snowden. This section of the statute enacts that "Whosoever, with the intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be liable," &c.

The woman, on whom the instrument had been used, died shortly after, and it appeared on examination of the body after death, that she was not pregnant at the time when she was operated upon.

It was objected on behalf of the prisoner that such a case is not within the statute, and as doubts appear to have existed on the subject (see 1 Russell on Crimes, 673 note j, 3d ed.) the judge postponed the judgment, and requested the opinion of the Judges.

Afterwards this case was considered by LORD DENMAN C. J., TINDAL C. J., POLLOCK C. B., PARKE B., PATTESON J., WILLIAMS J., COLTMAN J., ROLFE B., ALDERSON B., ERLE J. and PLATT B.

The Judges were unanimously of opinion, that under this statute, the fact whether the woman was or was not pregnant at the time the instrument was used, was immaterial. MSS. PARKE B.

The crime of abortion, as attempted, or as actually perpetrated, is defined and punished by statutes in England, and in many of the United States. But there is no uniformity in the language of the statutes in either country. The pleader, by attentively considering the operative words of the different statutes,

<sup>1</sup> 1 Denison C. C. 187. Reported under the name of Regina *v.* Goodall, 2 Cox C. C. 40, and Regina *v.* Goodchild, 2 Carrington & Kirwan, 293.

and the decisions of the courts upon them will have very little difficulty in determining the law applicable to any particular case.

In *Mills v. The Commonwealth*, 13 Pennsylvania State, 631, an indictment at common law charged as follows: "The Grand Inquest, &c. present that J. G. M. of the county aforesaid, dentist, on the tenth day of May in the year of our Lord —, and on divers other days and times between that day and the taking of this inquisition, in the county aforesaid and within the jurisdiction of this court, with force and arms, wilfully, maliciously, unlawfully and wickedly, did administer to and cause to be administered to and taken by one Mary Elizabeth Lutz, single woman, she the said Mary Elizabeth Lutz being then and there big and pregnant with child, divers large quantities of deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, teas, liquids, powders and mixtures; with intent thereby then and there to cause and procure the miscarriage and abortion of the said child of which the said Mary Elizabeth Lutz was then and there big and pregnant: to the great damage, &c." Coulter J.: "The error assigned is, that the indictment charges the defendant with intent to cause and procure the miscarriage and abortion of Mary Elizabeth Lutz, instead of charging the intent to cause and procure the miscarriage and abortion of the child. But it is a misconception of the learned counsel that no abortion can be predicated of the act of untimely birth by foul means. Miscarriage, both by law and philology, means the bringing forth the fetus before it is perfectly formed and capable of living; and is rightfully predicated of the woman because it refers to the act of premature delivery. The word 'abortion' is synonymous and equivalent to miscarriage in its primary meaning. It has a secondary meaning, in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been. It is a flagrant crime at common law, to attempt or procure the miscarriage or abortion of the woman, because it interferes with, and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life, and therefore it is punished."

In *Mills v. The Commonwealth*, 13 Pennsylvania State, 634, it was decided, that where the quickness of the woman is alleged in some counts of an indictment, at common law, but is omitted in others; but it is alleged in all of them that the woman is big and pregnant with child, and there is a general verdict of guilty, — there is no error in the record.

Where the language of a statute is general, "to procure the miscarriage of any woman," it is immaterial whether the woman was or was not pregnant at the time. *Regina v. Goodhall*. It is therefore unnecessary to allege in an indictment that the woman was "then and there pregnant with child." The earlier English statutes<sup>1</sup> made an important distinction between the case where the woman was quick with child, and where she was not, or was not proved to be, quick with child; and so clearly showed, that, to constitute an offence within those acts, the woman must have been pregnant at the time. *Rex v. Scudder*, 1 Moody C. C. 216, and 3 Carrington & Payne, 605 (1829). See *Regina v. Collins, Leigh & Cave* C. C. 471, and 9 Cox C. C. 497; 1 Bishop Crim. Law, § 671, 4th ed.; ante Vol. I. p. 9.

If there is any doubt as to the drug administered, charge it in different ways

<sup>1</sup> 43 Geo. III. ch. 55, and 9 Geo. IV. ch. 31, § 14.

in several counts, and add a count alleging it to be "a certain noxious thing to the jurors aforesaid unknown."

It is a principle in the law of criminal pleading, that when a statute makes two or more distinct acts connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offence, those which are actually done in the course and progress of its commission may be coupled in one count. On this principle, an indictment, on a statute which inhibits the use of "any means whatever," which charges one of the defendants with using instruments, and the same defendant, with other defendants, with administering drugs to procure a miscarriage, and that by both of said means the woman died, is not bad for duplicity; and proof of the use of either one of the means alleged is sufficient to warrant a conviction. *Commonwealth v. Brown*, 14 Gray, 419.

A statute prohibits the use of "any means whatever" to procure miscarriage. It also provides that if the woman shall die in consequence of the doing of any of the acts prohibited, which are done to procure and cause her miscarriage, the punishment to be inflicted upon the offender shall, to a certain specified extent, be increased and aggravated. An indictment which avers that the defendant, by one or more of the means described in the statute, with the intent to procure her miscarriage, killed the woman, is only alleging in another form of words, that she died in consequence thereof, and does not charge the crime of manslaughter. *Commonwealth v. Brown*, 14 Gray, 419.

An indictment which charges the use of instruments, the administering of drugs, and the thrusting the hand into the womb after the coming forth of the child, and the death of the woman in consequence of all the means so used, the averment of violence by the hand of the defendant at that period, constitutes no part of the description of the acts prohibited by the statute, and is therefore an immaterial and superfluous statement, and may well be rejected as surplusage. *Commonwealth v. Brown*, 14 Gray, 419.

In New York by statute, Laws of 1845, ch. 260, § 2, it is a misdemeanor to administer drugs, &c. to any pregnant woman *with intent to procure a miscarriage*; and by statute, Laws of 1846, ch. 22, § 1, it is manslaughter (a felony) to use the same means, *with intent to destroy the child*, in case the death of the child is thereby produced. An indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in conclusion alleged that the accused "did feloniously and wilfully kill and slay" the child. The intent averred was an *intent to produce a miscarriage*. It was decided on error that the indictment was fatally defective for the felony, but [sufficient] to sustain a conviction for the misdemeanor. *Lohman v. The People*, 1 Comstock, 379, affirming, s. c. 2 Barbour, 216; followed in *The People v. Stockham*, 1 Parker C. C. 424 (1853).

In Indiana the language of the statute is, "Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or employ any instrument, &c. with intent to procure the miscarriage of any woman," &c. An indictment charged that the defendant at a certain time and place "did feloniously, wilfully and unlawfully administer to one L. H. then and there being pregnant with a child, a large quantity of medicine, with intent thereby feloniously, &c. to procure the miscarriage of said L. H., the

administering said medicine to said L. H. not then and there being necessary to preserve the life of said L. H., contrary to the statute," &c. The objection to the indictment was, that it neither named the medicine administered nor alleged that it was noxious. Blackford J.: "This statute, so far as the present case is concerned, is similar to the second section of the statute 43 Geo. III. ch. 58; and it has been held that, on the trial of an indictment on that section, the name of the medicine administered need not be proved; that the question is, whether the prisoner administered any matter or thing to the woman with intent to procure abortion. *Rex v. Phillips*, 3 Campbell, 73 (1811). If the name of the medicine need not be proved, there seems to be no good reason for naming it in the indictment. It is also decided, in the case just referred to, that the indictment need not describe the medicine as noxious." *The State v. Vawter*, 7 Blackford, 592.

In Massachusetts the statute 1845, ch. 27, enacts, that "Whoever maliciously, or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing, or shall cause or procure her with like intent, to take or swallow any poison, drug, medicine, or noxious thing; and whoever maliciously, and without lawful justification, shall use any instrument or means whatever with the like intent, and every person with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned, &c.; and if the woman doth not die in consequence thereof, such offender shall be guilty of a misdemeanor, and shall be punished," &c.

An indictment on this statute need not allege that the child with which the woman was pregnant was alive, or that she was quick with child; nor whether she died or not in consequence of the operation. Nor is it necessary to prove that she was quick with child. The statute was intended to supply the supposed defects of the common law, and applies to all cases of pregnancy. *Commonwealth v. Wood*, 11 Gray, 86. The indictment in *Commonwealth v. Wood*, which was drawn on this statute, averred that the defendant at a certain time and place, "maliciously and without lawful justification, did force and thrust a certain metallic instrument, which the said Wood then and there had and held in his hand, into the womb and body of a certain woman by the name of Sarah Caffee, the said Sarah being then and there pregnant with child, with the wicked and unlawful intent of the said Wood then and there thereby to cause and procure the said Sarah to miscarry and prematurely to bring forth the said child with which she was then and there pregnant as aforesaid, and the said Sarah at said place and time, by means of the said forcing and thrusting of said instrument into the womb and body of the said Sarah in manner aforesaid, did bring forth said child, of which she was so pregnant, dead; against the peace," &c. This count was held not to be open to objection, as not alleging that the defendant used the instrument, nor who the woman was nor what was her name, nor that she brought forth the child prematurely, nor brought it forth dead in consequence of what the defendant had done.

The General Statutes of Massachusetts, ch. 165, § 9, enacts: "Whoever, with intent to procure miscarriage of any woman, unlawfully administers to her,

or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall be punished," &c. In *Commonwealth v. Sholes*, 13 Allen, 554 (1866), an indictment which was drawn under this statute alleged that the defendant, at a certain time and place, "unlawfully did use a certain instrument," in a manner which was particularly described, in and upon a certain woman who was pregnant, "with intent then and thereby to cause and procure the miscarriage of said woman." It was held that the indictment need not allege that the act was done "maliciously and without lawful justification:" it is sufficient to allege that it was unlawfully done with intent to cause and procure the miscarriage.<sup>1</sup> Gray J.: "An objection taken to the indictment is, that the defendant is not alleged to have committed the act therein described 'maliciously and without lawful justification.' But we are of opinion that no such allegation was necessary. The indictment following the words of the Gen. Sts. ch. 165, § 9, on which it is based, alleges that the defendant did the act described, 'unlawfully,' and 'with intent to cause and procure the miscarriage of the said woman,' and sufficiently sets forth a criminal act and a criminal intent. The word 'unlawfully' negatives and precludes any inference or possibility that the act was done by a surgeon for the purpose of saving the life of the woman, or under any other circumstances which would furnish a lawful justification. Any unlawful use of an instrument, with intent to procure miscarriage, is made criminal by the statute. The learned counsel for the defendant admit that, if the word 'feloniously' had been inserted in the indictment, their objection could not be supported; and the Gen. Sts. ch. 168, § 2, provide that 'it shall not be necessary to allege in any indictment or complaint that the offence charged is a felony, or felonious, or done feloniously;

<sup>1</sup> The defendant's counsel argued as follows:—

I. *Maliciously*. The indictment charges, that the defendant "unlawfully" did, &c. All his acts may have been "unlawful," and yet no crime have been committed. "A mere guilty intention is not sufficient to constitute a crime. There must be an intent coupled with an overt act tending to the perpetration of the crime." Pollock C. B. in *Regina v. Isaacs*, Leigh & Cave C. C. 224. Legal malice is defined in *Commonwealth v. York*, 9 Metcalf, 105, as "a wrongful act done intentionally, without just cause or excuse." The word "unlawfully" does not embrace all this. It has no technical meaning; and, although it is in the statute on which this indictment was founded, and the omission of it would vitiate the indictment, still this is not one of the class of cases in which, in describing an offence, it is sufficient to pursue the very words of the statute. Hawkins P. C. bk. 2, ch. 25, § 111. ed. Curwood. The word "maliciously" imports a criminal motive, intent, or purpose. *Commonwealth v. Walden*, 3 Cushing, 558.

II. *Without lawful justification*. Where the potion is given, or other means of causing abortion are used, by a surgeon, for the purpose of saving the life of a woman, the case is free from malice, and has a lawful justification. Report of the Massachusetts Crim. Law Commissioners in 1844, title "Abortion," I. note a. The operative words of the English statute, 7 Will. IV. and 1 Vict. ch. 85, § 6, are like those of the General Statutes. And all the precedents charge that the defendant "*feloniously* and unlawfully" did, &c. Archbold Crim. Pl. 14th ed. p. 551, and 4th Am. ed. p. 414. Archbold's Consolidated Statutes, p. 115. Precedent in Appendix to 6 Cox C. C. p. xcix. If the word "feloniously" had been inserted in this indictment, the objection, that the crime should have been alleged to have been committed "maliciously and without justification," could not be supported. That word would sufficiently show the *intent* with which the act was committed. Denman, arguing in *The King v. Towle*, 2 Marshall, at p. 468.

nor shall any indictment or complaint be quashed or deemed invalid by reason of the omission of the words 'felony,' 'felonious,' or, 'feloniously.'" *Commonwealth v. Jackson*, 15 Gray, 187.

In Maine it is enacted that "Every person who shall use and employ any instrument *with intent to destroy the child* of which a woman may be pregnant, whether such child be quick or not, and shall thereupon destroy such child before its birth, shall be punished by imprisonment in the State prison, not more than five years, or by fine," &c. Rev. Sts. ch. 160, § 13. "The offence described in this section," said Tenney J., "is not committed unless the act be done with an intent to destroy such child as is there referred to, and it be destroyed by the means used for the purpose. It is required by established rules of criminal pleading, that the intention which prompted the act that caused the destruction of the child, as well as the act itself, and the death of the child thereby produced, should be fully set out in the indictment, in order to constitute a crime punishable by imprisonment in the State prison, under the statute. The allegation that a certain instrument was used upon a woman pregnant, and that the use of that instrument caused her to bring forth the child dead, is not a charge, that the one using the instrument intended to destroy the child. The inference of such design, from the use of the instrument, and its effect, is by no means necessary. The third count in the indictment alleges the act to have been done with the intent to cause and procure the deceased to *miscarry* and *bring forth* the child of which she was then pregnant and quick, and that by means of that act she brought forth the child dead. But there is no allegation that the act was done with the *intention* that she should bring forth her child dead, or with an intent to destroy it, unless the words '*miscarry*,' and '*bring forth the child*,' necessarily include its destruction. . . . It is quite clear that the word "*miscarriage*," in its legal acceptation, and as used in this indictment, does not necessarily include the destruction of the child before its birth; and a design to cause its *miscarriage* is not the same thing as a design to *destroy* the child. The other term used in the indictment, '*to bring forth the said child*,' does not imply even a premature birth. Consequently it gives no additional strength to the charge." *Smith v. The State*, 32 Maine, 48.

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## REGINA v. CASPAR.<sup>1</sup>

March Sessions 1840.

### *Indictment — Receiving Stolen Goods — Substantive Felony.*

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously received the said goods, knowing, &c. is bad as against A. B., but good against the receiver as for a substantive felony.

<sup>1</sup> 2 Moody C. C. 101. 9 Carrington & Payne, 289.



THE prisoners were tried before Mr. Justice Littledale, at the Old Bailey Sessions in June 1839.

The following is an abstract of the indictment: First count alleged that a certain evil-disposed person stole, on 25th of March, at St. George in Middlesex, 102 pounds' weight of gold-dust, value, £5,000; 2 wooden boxes, value 2s.; and 2 tin boxes, value 2s.; the goods of James Hartley and others. Second count charged Lewin Caspar with feloniously inciting, &c. said evil-disposed person to commit said felony on 10th of March. Third Count, Ellis Casper, like offence. Fourth count, Emanuel Moses, feloniously receiving, on 30th of March, the said 102 pounds' weight of gold-dust, value £5,000, knowing, &c. Fifth count, Isaac Isaacs, alias Davis, feloniously receiving all the goods mentioned in the first count, knowing, &c. on 30th March. Sixth count, Alice Abrahams, feloniously receiving, as in the fifth count. Seven other counts, stating the property to be of George Hathorne and others. Fourteen other counts stating the property to be gold instead of gold-dust. Isaac Isaacs, alias Davis, mentioned in the indictment, was not in custody, and was not tried.

It struck the judge, on looking over the abstract, that it was incorrect in calling the statement of the offences committed by the several prisoners so many counts; and he then thought that what were called the seven first counts were only one count against a principal and several accessories, assuming that receivers may be considered accessories in the strict legal sense of the word.

After Mr. Clarkson had opened the case for the prosecution, Bompas, Sergeant, who was counsel for Moses, one of the prisoners, said that Mr. Clarkson ought to elect which of the prisoners he would proceed against; but Mr. Clarkson said it was not a case in which he was bound to elect, and the question was not then much discussed; but in the view the learned judge then took of the indictment, that it was a case of principal and accessories, he thought the prosecutor was not bound to elect. If he had thought otherwise of the indictment, he would have directed him to elect.

The case then proceeded, and a person called Henry Moss was produced, and examined on the part of the prosecution as the evil-disposed person mentioned in the indictment, who stole the gold-dust. He was not a person unknown either to the grand jury or the prosecutors, for his name was on the back of the indictment as

a witness. And there was another indictment found by the grand jury, in which Henry Moss, by name, was charged as the person who stole the gold-dust, and which last-mentioned indictment was, except as to Henry Moss being named instead of saying an evil-disposed person, exactly the same as the present indictment, under which the trial took place.

The prisoners were not tried upon that other indictment, and it then remained undisposed of.

Though Henry Moss was produced and examined on the part of the prosecution as the person who stole the gold-dust, it was a question for the jury, upon the whole of the evidence, whether Henry Moss was the person who stole it, or whether it was Lewin Caspar who did so.

When the evidence for the prosecution was closed, Bompas, Sergeant, and the other counsel for Moses, contended that there was no case to go to the jury as to Moses, and the counsel for the other prisoners contended the same as to the other prisoners.

They urged that there were two ways of framing an indictment against an accessory ; either by indicting the principal with the accessory, or, if the accessory be indicted alone, you must either show that the principal had been convicted, and that can only be shown by proving the record of the conviction, or else by showing that the principal had been outlawed.

That Moses was charged as an accessory after the fact, by receiving the stolen goods, by the fourth part of the first count ; and that, as the prosecutor had not proved that the principal had been convicted, the accessory was entitled to an acquittal ; that the accessory cannot be convicted till the principal be convicted or outlawed ; and if the principal be attainted, and the attainder be reversed, the accessory escapes ; and the same doctrine applies to cases where the principal and accessory are tried together.

If the principal pleads not guilty, and the accessory does so also, then the trial of both shall go on ; and the jury are to inquire, first, of the guilt of the principal, and, if they find him guilty, then they are to inquire as to the accessory ; but, if both are found guilty, the judgment must be first given of the principal, for if any thing obstruct judgment — as clergy or pardon, &c. — the accessory is to be discharged ; and if the principal does not plead not guilty, but pleads a plea in bar, or in abatement, or autrefois acquit, the accessory shall not be put to answer till that

plea be determined. Where the guilt of the principal is averred, it can only be proved by the principal being tried with the accessory ; or if he be not, then by the record of conviction or outlawry of the principal.

That was the rule of the common law ; and though receivers were not, at common law, accessories after the fact, merely as receivers, yet they become so by 3 & 4 Wm. III. ch. 9, § 4 ; and that the statute 7 & 8 Geo. IV. ch. 29, § 54, confirms the old law as far as relates to accessories, though it also gives another mode of proceeding, that is, for a substantive felony ; but here the indictment is not framed against the receivers as for a substantive felony under the statute, but it is in the form of an indictment against the principal and accessory, and must be governed by the rules of the common law.

They also urged that the indictment, as far as related to the description of the principal, was bad, because it ought to have been in such a form as that the principal could have been legally convicted. It may refer to any person. There is no principal felon properly charged ; no process could issue upon it, to bring in any principal to be tried, nor could any principal surrender himself upon such an indictment to take his trial. It should be so framed, in order to make it good as against the accessories, as that the principal could be tried and convicted with him, or that they could have put in the conviction of the principal. The indictment is too uncertain to make it good either against the principal or accessories. They contended that the principal ought to be named.

If it had said that the goods were stolen by a certain person to the jurors unknown, that would not be supported if he was known. It should show who stole the goods ; for otherwise the accessories do not know what is the felony against which they are to defend themselves.

Suppose there were two indictments against a prisoner for the same offence, and there was an acquittal on the first, how could he plead *autrefois acquit* on an indictment so uncertainly framed ? What evidence could he give as to who was the evil-disposed person mentioned in the first indictment ? The evil-disposed person might be John Thomas or William Smith, or anybody else ; and if it be an indictment to which you cannot apply *autrefois acquit* or *autrefois convict*, it is a bad indictment. There being two in-

dictments in respect of this transaction, is a practical illustration of the extreme difficulty in which a prisoner is placed.

They said the last objections were rather on the record.

The learned judge remarked here, that suppose the objection, that the record of the conviction was not put in, be a valid one, that, perhaps, may be thought rather to be on the record, because it would be impossible to put in a record of conviction of a certain evil-disposed person: and then, if it ought to be proved by a record, the indictment would be bad for being drawn in such a way as that the proper evidence could not be given.

The counsel for Moses admitted, that if the indictment had been for a substantive felony, under the statute 7 & 8 Geo. IV. ch. 29, § 54, merely for receiving the goods, knowing them to be stolen, it would not be necessary to state who stole the goods. But that this indictment was not framed under the statute; it is an indictment against principal and accessory, and not for a substantive felony. That a substantive felony was a single felony against one or more individuals; whereas here there were five separate felonies, one of the prisoners being charged as accessory both before and after the fact. If it was a substantive felony, the prosecutor ought to elect against which of the prisoners, and for which felony, he would proceed. That if it was a substantive felony, and not to be treated as an indictment against principal and accessory,<sup>a</sup> a great deal of evidence had been given against the prisoners Moses and Abrahams which would not have been admissible if they had been separately tried for a substantive felony.

The counsel for the two Caspars, in addition to the objections made as to the receiving, contended, that whatever might be the rule as to the necessity of naming the principal felon in the case of receivers, it was essentially necessary that he should be named in the case of accessories before the fact, for otherwise it would be quite impossible for them to know against what felony they were to defend themselves; and that even in the case of a substantive felony, either against one person for a felony, or more than one person for a joint felony, the principal ought to be named.

The counsel for the prisoners then again urged, that whatever the prosecutor was bound to do, as to electing against which of the prisoners he would proceed before the evidence was gone into, he was, at all events when it was closed, bound to elect as to

which of the prisoners singly the case should be submitted to the jury.

The counsel for the prosecution contended that all the objections were upon the record.

They admitted that there was no instance of such an indictment having ever been used before ; but that the circumstances of the case were of a novel description, and it became necessary to adopt a novel form of indictment to meet them.

They said, this is not an indictment against principal and accessories, but it is for a substantive felony, and is inquirable into, as to accessories before the fact, under 7 Geo. IV. ch. 64, § 9 ; and as to receivers under 7 & 8 Geo. IV. ch. 29, § 54 ; and it is one entire transaction, though the parts are done at different times.

It is composed of the stealing by Moss, of the inciting by the two Caspars, and of the receiving by Moses and his daughter Abrahams, and by Ellis Caspar ; and the whole relates to the stealing and disposing of the property.

That there has been no decision as to what is meant by a substantive felony ; but there is no authority to show that this is not a substantive felony. And there is no necessity to mention the name of the principal ; though if it had alleged that it was stolen by a person unknown, it could not be supported if he was known.

That there was no necessity to prove any record of conviction ; that it was not alleged ; nor could any record of conviction of an evil-disposed person be made up. That it was sufficient to prove, by parol evidence, who stole the gold-dust ; and the jury may decide upon his guilt just the same as if he had been put upon his trial with the accessories ; and that, as to the difficulty alleged as to the pleading *autrefois* acquit or *autrefois* convict, there would be no difficulty in supporting such a plea by proper averments.

That there are many instances of separate felonies included in the same indictment, and being tried as substantive felonies. That the proper interpretation of the words, substantive felony, is, that it has reference only to the transaction itself, merely for the purpose of stating the offences themselves which are to be the subject of inquiry, i. e., the whole transaction, or *corpus delicti* ; and that, under the meaning of the expression, substantive felony, you may have an indictment without naming the principal.

That it was not a case where the prosecutor was bound, either

before the evidence was gone into or after it was closed, to elect which of the prisoners, singly, he would proceed against, as it was all one transaction. That if the prisoners meant to say that there ought to have been a previous conviction of the principal, they should have objected to being put upon their trial before the principal was convicted.

The learned judge thought after the evidence was closed, as he had done before it was gone into, that upon an indictment like the present, the prosecutor was not bound to elect as to which of the prisoners, singly, the case should be submitted to the jury.

The form of the indictment was new to the learned judge, and indeed the counsel for the prosecution admitted it to be new.

The jury found all the prisoners guilty of the respective offences with which they were charged.

The counsel for the prisoners were considered as having moved all the objections which arose on the record in arrest of judgment.

The learned judge respited the judgment, that the opinion of the Judges might be taken upon all the objections.

The learned judge also observed, that in 1 Hale's Pleas of the Crown, 623, it is said, the accessory shall not be constrained to answer to his indictment till the principal be tried; but if he will waive that benefit, and put himself upon his trial before the principal be tried, he may, and his acquittal or conviction upon such trial is good; but it seems necessary, in such case, to respite judgment till the principal be convicted and attain, and then the book goes on to give the reasons for it.

If that now be the law, and if this indictment be one against principal and accessory, a question will arise, supposing none of the before-mentioned objections to be tenable, and that the indictment be a good and valid indictment, yet whether any judgment can now be given upon it, and whether it must not be respited till the principal be convicted. But then no principal could be convicted upon this indictment, for the principal is an evil-disposed person, and no person by name could be tried upon it and found guilty by a jury, nor could any person by name plead guilty to it, so that any judicial notice could be taken of it.

The authorities applicable to these various points are, 3 & 4 Wm. III. ch. 9, § 4; 1 Anne, stat. 2, ch. 9, §§ 1, 2; 5 Anne, ch. 31, §§ 5, 6; 7 Geo. IV. ch. 64, §§ 9, 11; 7 & 8 Geo. IV. ch. 29, §§ 54, 56; 1 Hale P. C. ch. 56, p. 618; ch. 57, p. 623; 2 Hale P. C. ch.

24, pp. 168, 174; ch. 28, pp. 216, 222, 223, 224; Hawkins P. C. bk. 2, ch. 29, in several sections; Foster Crown Law, 343, and ch. 2; as to accessories in felony, p. 360, and following pages; 2 East P. C. ch. 16, § 140, and following sections; p. 740, and following pages; Thomas's Case, 2 East P. C. ch. 16, § 164, p. 781; 2 Russell Crim. Law, ch. 27, p. 252, and following pages, and the cases in the notes to pp. 257, 258; Starkie Crim. Pl. 130, 156, 157, 307, and following pages; Tilley's Case, 2 Leach C. C. (4th ed.) 662; 1 Russell Crim. Law, 385, 390.

This case was argued at a meeting of all the Judges, except ALDERSON B. and ERSKINE J. in Michaelmas term 1839.

*Bompas*, Sergeant. There are two propositions to be established. First, that this is an indictment against principal and accessories, or, at all events, against accessories. Secondly, that unless the principal be convicted, the accessories cannot. The learned judge so declared his opinion at the trial, in refusing to put the prosecutor to elect; that the indictment was in the nature of one against accessories, and it is obvious that that question is in many respects highly important beyond what respects the question of election. The whole proceeding would be materially varied, many things would be admitted in evidence against persons tried as accessories that would not be so in a trial for a substantive felony. As in the case of declarations, if there be, in fact, separate acts of receipt, and all the receivers are indicted together with the principal, his declarations would be necessarily receivable as against the principal, and so affect the rest, and the declarations of each receiver would be received as against himself.

Here two are, in fact, indicted as accessories before the fact; others as accessories after.

The statute 7 Geo. IV. ch. 74, § 9, for the more effectual prosecution of accessories before the fact, makes them indictable either with the principal felon or for a substantive felony. The different modes of indictment are clearly distinguished. In fact, the indictment, on the face of it, is clearly framed as one against accessories, and it was clearly so treated at the trial. Supposing the other indictment, in which Henry Moss is named, were before the court, he would of course be put on his trial as principal; and the only difference in substituting "a certain evil-disposed person" for the name there cannot change the nature of the indictment. Indictments against receivers, as accessories in general, pursue this

form with the name of the principal. If this be an indictment against accessories at common law, the principal must be convicted before the accessory can. *Lord Sanchar's Case*, 9 Rep. 119, 1 Hale P. C. 623. Even if a prisoner should be taken to waive the trial of the principal by pleading to the indictment, no judgment can be passed against him, even if convicted.

In 1 Hale Pleas of the Crown, 623, it is laid down, "If the accessory be indicted either alone or together with the principal, the process of outlawry shall not go against the accessory till the principal be admitted or outlawed; neither shall he be put to plead till the principal appear, but shall be bailed till the principal appear."

"The accessory shall not be constrained to answer to his indictment till the principal be tried. 9 Edw. IV. 48 a. But if he will waive that benefit, and put himself upon his trial before the principal be tried, he may, and his acquittal or conviction upon such trial is good. *Stamf. P. C. lib. I. cap. 49 f. 46 b.*"

"But it seems necessary, in such case, to respite judgment till the principal be convicted and attaint; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him; but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 8 H. V. 6 b. *Coronne* 463."

The prisoner does not waive his right by pleading; in fact, the prisoner never does exercise any discretion in pleading; he does so as matter of course, to which he is compelled, in general.

**LORD ABINGER.** The question is, whether the indictment is good according to the modern statutes.

The offence of accessory before the fact was one at common law; this of accessory after, by receiving only, was created by statute. The history of the law on the subject is traced in 2 East P. C. 743. The first statute that makes receivers of stolen goods accessories after the fact, is 3 William & Mary ch. 9, § 4; then comes the 5 Anne, ch. 31, § 5. By both of these statutes, the offence of accessory is made complete by the fact of receiving, but by the latter the party might be tried for a misdemeanor; but still he might have been indicted as accessory and was subject to the same liability and entitled to the same privileges as accessories generally. After the statute of Anne, there were two distinct accessions to the felony and the misdemeanor. Then the statute of 7 & 8 Geo. IV. ch. 29, § 54, enacts, 'that every such receiver shall be guilty of felony,



and may be indicted and convicted either as an accessory after the fact or for a substantive felony ; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not have been amenable to justice," &c. Now, inasmuch as the principal here has not been convicted, this indictment must be taken to apply to the latter case of a substantive felony ; and it includes a great many different persons, who could not be joined for different substantive felonies. On that ground, the learned judge states he would have stopped the case. Several receipts perfectly distinct were given in evidence on that principle, and all the declarations by this joinder became admissible, and were admitted. The judge ought to have put the prosecutor to his election ; and if so, they are improperly tried, and being improperly tried, they were convicted improperly. If they were indicted as accessories under the statute, still the principal must be convicted as at common law. The meaning of a substantive felony must be, that each case stands by itself, not requiring the connection with the principal felon that is necessary in the case of accessories. If taken altogether as accessories with the principal felon, that is the connecting link ; but three persons, for several distinct offences, cannot be joined. But here more is done, inasmuch as accessories before the fact are joined with accessories after, that is, accessories before the fact to the principal felon, not to the receivers ; and as between them there is no connection whatever, and the prosecutor has chosen this course, both being open.

LORD ABINGER. Supposing it a mistrial, by election being refused, what must be the result ?

LITLEDALE J. I certainly should have compelled election, if I had not considered it as a case of principal and accessory.

But the indictment is bad, as to Lewin Caspar, altogether. He is only indicted as accessory before the fact, and that to a person not named. In the case of receiving stolen goods, the offence may be identified by the goods ; in the case of an accessory, the identification must be made out by the person to whom is the accession. He must be named and shown to the jurors in the indictment. If unknown, that excuse must be shown in the indictment. This is so, notwithstanding the 7 Geo. IV. ch. 64, § 9, the inciting being necessarily connected with the person incited ; and that not being supplied in the case of accessory before, as it can in the case of

accessory after, by receiving stolen goods, the whole of which offence may be distinctly proved without any necessary identification of the person of the thief. In all cases, it is a rule that the person be named, or an excuse given for the omission. In *The King v. Fuller*, 1 Bosanquet & Puller, 180, it was debated whether the mode of incitement to mutiny, &c. ought not to be shown. That shows the nicety requisite in this particular species of offence.

LORD ABINGER. A case occurred before me of the murder of a child, the name not stated, in Essex, and the Judges held the indictment bad. *Regina v. Bliss*, 2 Moody C. C. 93; 8 Carrington & Payne, 773.

There is no instance of an indictment for an injury to the person where such vagueness is admitted. When the offence relates to an individual, you are obliged to give all the identification, or state the excuse.

LORD DENMAN C. J. Otherwise the prosecutor may select out of a class of persons stated, and the prisoner be totally unprepared as to the individual selected.

*Clarkson*, for the prosecution. The case, as stated by the learned judge, brings forward all the objections. They resolve themselves as argued to-day, into three: 1. That this is an indictment against principal and accessory, and it does not show that the principal has been convicted or outlawed. 2. That we ought to have been compelled to elect against whom we would proceed. 3. That the indictment is bad as to the accessories before the fact, inasmuch as the principal is not named.

At the trial, no objection was made to being tried on the ground of the principal not being forthcoming; that was perfectly well known, and it is now too late to take the objection. It ought to have been taken before going to the jury, if this be an indictment against principal and accessory. 1 Hale P. C. 623.

LORD DENMAN C. J. Does not that assume that there is a proper statement of a principal?

There are authorities to show that accessorial charges are good without name. In *Rex v. Wheeler*, 7 Carrington & Payne 170, an indictment charging a receiving from a certain evil-disposed person unknown, knowing the goods to have been stolen by said evil-disposed person, was held good; and in *Rex v. Jervis*, 6 Carrington

& Payne 156,<sup>1</sup> a similar indictment was sustained. And Tindal C. J. there goes into the principle of the law, that the offence consists in receiving goods, knowing them to have been stolen, and not necessarily knowing the particular person. The rule as to joinder of offences has the exception of principal and accessories; from this, necessarily, the accessories are frequently joined, though not connected, in the same act as accessories.

PATTESON J. The name of the principal felon need not be stated when the case of receiving is treated as a substantive felony. Is there any case of that sort, where the charge is against an accessory of any other kind?

My answer is, that it is too late to take the objection now; they have no right to take the chance of a trial, and then turn round with this objection. If the objection had been taken, the trial might have proceeded on the indictment against Moss; and it is the more important now, as the proviso in § 54, of 7 & 8 Geo. IV. ch. 29, makes it exceedingly doubtful whether Moss could now be tried at all.

But this is, in substance, an indictment for a substantive felony. The common forms against receivers are in the nature of accesso-

<sup>1</sup> This case is reported in 6 Carrington & Payne, 156, as follows:—

REX v. JERVIS.

1833.

Before LORD CHIEF JUSTICE TINDAL.

In an indictment for the substantive felony of receiving stolen goods, an allegation, that the goods were stolen "by a certain evil-disposed person," is good, without stating the name of the principal felon, or averring that he is unknown.

INDICTMENT for receiving stolen goods, knowing them to have been stolen.

The first count charged the prisoner with having received the goods, knowing them to have been stolen by one Joseph Rudge. The second count charged the goods to have been stolen by "a certain evil-disposed person."

*Lee*, for the prisoner. I submit that the second count is bad. It ought either to have stated the name of the principal, or else to have stated that he was unknown.

TINDAL C. J. It will do. The offence created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question therefore will be whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute 7 & 8 Geo. IV. ch. 29, § 54, makes the receiving of goods, knowing them to have been stolen, the offence. *Verdict — Guilty.*

rial charges, but the substance is the same. Here only one transaction is stated, one entire history gone into ; this indictment does not state distinct transactions.

LITTLEDALE J. I treated them all as one count.

The object of the statute is to facilitate convictions against receivers ; the object is to reach them as accessories, though in a different form — to reach the accessories when the principal is not forthcoming. It is the constant practice to join several receivers in the same indictment, when the acts of receipt are distinct ; the only difference is to charge them in different counts, as separate receivers, when the receivings are separate, and to join them in one count when the receiving is joint. The effect of the declarations of different prisoners being received is only accidental ; and the judge, of course, takes care to point out the distinct applications of the evidence. Here there is no principal charged against whom any process may go. It therefore can only be a substantive felony. We always contended it had a substantive character, though from the nature of the transaction, there must be something accessorial about it. The old form of indictment at the Old Bailey sometimes charged stealing from a person unknown. In one case at the Old Bailey, of *Rex v. Smith*, a prisoner was convicted, without objection, of inciting a girl, unknown, to steal, &c.

PARKE B. May not the indictment be now good, as using the words of the statute ?

In fact, there is no hardship upon the prisoners, as only one transaction is talked of ; and the indictment may be good as to the accessories after the fact, and bad as to those before.

*Bompas*, Sergeant, in reply. The objection was taken in the proper time. The practice and object of putting a prosecutor to his election is to prevent injustice, and it would be gross injustice if an ignorant person were to be bound as by a waiver by pleading. It would be carrying the provisions of 7 Geo. IV. ch. 64, §§ 20, 21, too far, to say, that it would be enough to pursue the words of the statute without any particulars whatever, otherwise it would do to charge a prisoner with inciting a person to commit a felony, not naming either the person or the felony. In all cases of accessories, the transaction is the same as to the principal ; then they are all accessory to the same felony. The cases cited are not cases of conversion of counts relating to accessories into counts for substantive felonies, but the choice of two different counts.

MAULE B. Can the first statement, that an evil-disposed person stole, be considered as an indictment at all against anybody ?

LORD ABINGER. Is it any thing more than stating first what is usually stated last, in indictments against receivers ?

The Judges adjourned the consideration of this case, and in the following term (March Sessions 1840) they determined that the statement, that an evil-disposed person stole, was too uncertain to support the charge against Lewin Caspar as accessory before the fact ; but that the other prisoners were sufficiently charged with a substantive felony in receiving, and properly convicted.

The statute has made the crime of being an accessory a *substantive felony*, and the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory, is done away with by that enactment. If the accessory is captured before the principal, he may, under the statute, be at once tried and convicted: If the principal is afterwards taken, tried, and acquitted, the accessory has no right to be discharged. *Regina v. Hughes*, Bell C. C. 242 ; 8 Cox C. C. 278. The general rule of law undoubtedly is, that an indictment for a *substantive felony*,<sup>1</sup> charging the defendant with feloniously receiving stolen goods, need not set forth the name of any person from whom they were received, nor that they were received from some person or persons unknown. *Rex v. Jervis*, 6 Carrington & Payne, 156 ; ante p. 462 note. *Rex v. Wheeler*, 7 Carrington & Payne, 170. *Regina v. Pulham*, 9 Carrington & Payne, 280. *The State v. Hazard*, 2 Rhode Island, 474. *Commonwealth v. King*, 9 Cushing, 284. *The State v. Coppenburg*, 2 Strobhart, 273. *The State v. Murphy*, 6 Alabama, 845. *The People v. Caswell*, 21 Wendell, 86. *The State v. Ives*, 13 Iredell, 338. *Swaggerty v. The State*, 9 Yerger, 338. *The State v. Smith*, 37 Missouri, 58. And see *Rex v. Thomas*, 2 East P. C. 781. The confusion and doubt on this subject seem to have arisen from not clearly distinguishing between a receiving as accessory, and a receiving as for a substantive felony. In some of the cases cited above, this distinction has been carefully observed. "The offence is not," said Brayton J. in *The State v. Hazard*, 2 Rhode Island, at p. 480, "as was said by Tindal C. J. in *Rex v. Jervis*, ubi supra, the receiving of stolen goods from any particular person, but the receiving knowing them to have been stolen ; it is not that of an accessory which requires the name of the principal to be alleged, and what would follow necessarily, that the receipt must be from him to make him accessory."

Where one charged Woolford with stealing a gelding, and Lewis with receiving it, knowing it to have been "so feloniously stolen as aforesaid," and Woolford was acquitted ; Patteson J. ruled that Lewis could not be convicted upon this indictment, and that he might be tried on another indictment, charging him with having received the gelding, knowing it to have been stolen by some person un-

<sup>1</sup> In Carrington's Supplement, p. 125, 3d ed. (1828), it is said that the term "substantive felony" is new in the criminal law. The term is used to denote a felony which may stand or be tried alone, independently of the felony of the principal, or of his conviction.

known. *Rex v. Woolford*, 1 Moody & Robinson, 384.<sup>1</sup> *Commonwealth v. King*, 9 Cushing, 284, on the authority of *Rex v. Woolford*. *Rex v. Elsworthy*, 1 Lewin C. C. 117. But a contrary doctrine has been maintained. *The State v. Coppenburg*, 2 Strobhart, 273. *The People v. Caswell*, 21 Wendell, 86. 1 Gabbett Crim. Law, 841. 2 Deacon Crim. Law, 1092. And in *Regina v. Craddock*, as reported in 4 Cox C. C. 410, Pollock C. B. said: "In that case (*Rex v. Woolford*) the learned judge seems to have entertained some doubt whether his direction was right; but it became unnecessary to consider the matter further, as the prisoner was acquitted altogether."

In *Rex v. Walker*, 3 Campbell, 264, it was ruled that an indictment against an accessory before the fact to a larceny, which stated a stealing by "a certain person to the jurors unknown," and that the prisoner incited, &c. "the said person unknown" to commit the said felony, could not be supported where the principal felon was a witness before the grand jury. The counsel for the prosecution, in opening the case, stated that the grand jury had found the bill upon the evidence of the principal, who acknowledged that he had stolen the goods in question, and proposed to call the principal as a witness to establish the guilt of the prisoner. But Le Blanc J. interposed, and directed an acquittal. He said he considered the indictment wrong, in stating that the wheat had been stolen *by a person unknown*; and asked, how the person who was the principal felon could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill? "The offence must not only be proved as charged, but it must be charged as proved." Bigelow J. in *Commonwealth v. Blood*, 4 Gray, at p. 33.

If the indictment against an accessory state the larceny to have been committed by some person to the jurors unknown, it is no objection that the grand jury, at the same term of the court, find an indictment for the principal felony against J. S. *Rex v. Bush*, Russell & Ryan C. C. 372. *Commonwealth v. Hill*, 11 Cushing, 137.

In a recent case in England the indictment in the first count charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty. It was held that there was no repugnancy; for that, although the word "aforesaid" in a subsequent count virtually incorporates all the necessary averments as to time and place in that count, the words, "so as aforesaid feloniously stolen," did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by *some person*. *Regina v. Craddock*, 2 Denison C. C. 31. *Temple & Mew C. C.* 361.

The first count charged H. Craddock with stealing a promissory note for £10 from the person of R. Harvey; the second count with stealing a bank-note for £10 from the person of the said R. Harvey; and the last count with feloniously receiving "the goods and chattels aforesaid, *so as aforesaid feloniously stolen*." The jury found the prisoner not guilty upon the first two counts, but guilty of receiving under the third count; and, upon a case reserved, it was contended

<sup>1</sup> Williams J. "In *Rex v. Woolford*, there was no repugnancy." Martin B.: "It was a case of variance." *Regina v. Craddock*, 2 Denison C. C. at p. 34.

that the judgment ought to be arrested, because the words "so as aforesaid" were descriptive, and meant "stolen by H. Craddock aforesaid."

WIGHTMAN J.: "Are those words necessarily descriptive of *all* the incidents of the stealing stated in the other counts? Because, if they are capable of being construed so as to avoid a repugnancy, the court will give them a construction which will support the indictment, rather than one which will vitiate it."

POLLOCK C. B.: "The several counts are wholly independent of each other. The fact of the prisoner having been acquitted on the first two counts has no bearing whatever on the charge contained in the third, and it cannot be used as evidence on that count either for or against him. That count stands or falls on its own merits. If it must be taken to mean the goods so stolen by H. Craddock, still if in *rerum natura* a man can possibly be a receiver of goods stolen by himself, which he clearly may be, then there is no objection to this indictment on its face. Your objection being solely technical may be met by an answer equally technical. Assuming the count to allege the goods to have been stolen by the said H. Craddock, then after verdict we must assume that such allegation was proved. It is quite immaterial that there may seem to be a contradiction on the face of the record owing to the acquittal on the other two counts. There is not necessarily a contradiction.

WIGHTMAN J.: "I see no necessity for construing the third count so as to create a repugnancy; after verdict the words must be construed *ut res majus valeat quam pereat*."

POLLOCK C. B.: "The court are all of opinion that the conviction is right. If we hold that the words must be construed as you suggest, then after verdict it must be taken that such a stealing was proved; if on the other hand, as some of the court think, the words need not be construed so as to create such seeming repugnancy the objection is wholly groundless."

In *Regina v. Huntley*, Bell C. C. 238; 8 Cox C. C. 260, the prisoner was charged in the indictment with stealing certain goods and chattels, and in the second count with receiving "the goods and chattels aforesaid, of the value aforesaid, so as aforesaid feloniously stolen." He was acquitted upon the first count, but convicted upon the second; and it was contended that the conviction could not be sustained, because a person cannot be said to have feloniously received goods stolen by himself. Erle C. J.: "We are of opinion that the words in the second count, 'so as aforesaid feloniously stolen,' may be construed to mean simply 'stolen goods,' and therefore such goods as the prisoner might be convicted of receiving. 'So as aforesaid' is an immaterial averment; the conviction therefore can be sustained." It is clear that a person may steal, hand over to another, and afterwards receive from him again, and so be both a principal and a receiver, just as a person may be an accessory before the fact, and afterwards receive the goods knowing them to have been stolen. 2 Russell on Crimes, 557 note. 4th ed.

It is necessary that the goods received shall appear to be the very goods stolen, or part thereof. A. and B. were indicted, A. for stealing six bank-notes of £100 each, and B. for receiving "the said notes." A. stole the notes, changed them into notes of £20 each, some of which he gave to B.; and it was held that B. could not be convicted, for he did not receive the notes that were stolen. *Rex v. Walkley*, 4 Carrington & Payne, 132.<sup>1</sup> Therefore if the goods

<sup>1</sup> "It is conceived," writes Mr. Greaves, "that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving *the* chattel stolen, know-

stolen have been altered between the time of the larceny and that of the receipt, so as to pass under a new denomination, the indictment should correspond with the fact. Yet, where the indictment charged the principal with stealing one live sheep, the goods, &c. of J. L. and the accessory with receiving "twenty pounds of mutton, part of the goods, &c. so as aforesaid feloniously stolen, &c." the conviction was held to be proper; though the thing received passed under a different denomination from that which was stolen. *Rex v. Cowell*, 2 East P. C. 617, 781.

It is laid down in the text-books that an indictment against a receiver of stolen goods, charging him as an accessory, need not allege time and place to the fact of stealing the goods; it is sufficient if they be alleged to the fact of the receipt; and *Stott's Case*, 2 East P. C. 751, 753, 780, is uniformly cited to sustain the proposition. 1 Gabbett *Crim. Law*, 840. 2 Russell on Crimes, 551. 4th ed. 2 Deacon *Crim. Law*, 1090. 1 Starkie *Crim. Pl.* (ed. 1828) 169. The precedents also in 2 Starkie *Crim. Pl.* 483, 484, of indictments for misdemeanor in receiving stolen goods, appear to be framed on *Stott's Case*. This case is thus stated in 2 East's Pleas of the Crown, 780: "The indictment against a receiver of stolen goods need not allege time and place to the fact of stealing the goods; it is sufficient if they be alleged to the fact of the receipt. This was expressly decided upon consideration in *Stott's Case*, upon an indictment against him as a receiver of pieces of iron, which was removed into B. R. by writ of error, after judgment against him of imprisonment by the Quarter Sessions; though ultimately the court gave no opinion on the rest of the case, the writ of error being abandoned by the prisoner. It appeared on inquiry of the clerks of assize of the Western and Oxford circuits, and of the clerk of arraigns at the old Bailey, that such had always been the form of indictment used by them." But in *Regina v. O'Connor*, 5 Queen's Bench, 17, 35, which was an indictment for conspiracy, Lord Denman C. J. said: "An objection was also taken to the fourth count, on the score of the venue, a material fact being alleged without place. *Stott's Case*, reported in 2 East's Pleas of the Crown, was thought to bear directly on this doctrine, and was not successfully distinguished in the argument. But the Master of the Crown Office has found the paper book in that case, on which Ashhurst J. took his note of the argument, conducted by Lord Abinger on the one side, and the late Mr. Justice Vaughan on the other, in Michaelmas term 1798. The indorsement of that learned judge intimates that the case stood for further argument. The prisoner was convicted in April, and then sentenced to twelve months' imprisonment, more than half of which expired before the argument; and there is every reason to suppose that Sir E. H. East is mistaken in reporting that case as decided. Indeed he himself intimates, at p. 753, that if there was error in the sentence, it might possibly have been amended by being changed into transportation for fourteen years, and that the prisoner's counsel was aware of the danger that might attend the success of his argument."

ing that chattel to have been stolen. In the case of gold, silver, &c. if it were melted after the stealing, an indictment for receiving it might be supported, because it would still be the same chattel, though altered by the melting; but where a £100 note is changed for other notes, the identical chattel is gone, and a person might as well be indicted for receiving the money, for which a stolen horse was sold, as for receiving the proceeds of a stolen note." 2 Russell on Crimes, 561 note. 4th ed.



In Indiana it has been decided that time and place need not be alleged to the fact of stealing the goods. *Holford v. The State*, 2 Blackford, 103. Scott J. delivered the opinion of the court as follows: "Holford was indicted in the Dearborn Circuit Court for receiving stolen goods; on which indictment there was a verdict of conviction and judgment. The errors assigned are, that the indictment does not allege any time and place when and where the goods were stolen; and that on the trial there was no evidence to prove that the said goods were stolen within the State of Indiana. To test the validity of the errors assigned, it is necessary only to revert to the statute creating the offence. The words of the statute are as follows; to wit, 'every person who shall buy or receive stolen goods, knowing the same to be stolen, shall upon conviction be punished,' &c. Rev. Code, 1824, p. 140. In an indictment every material fact ought to be alleged with the certainty of time and place; and every fact is material which is necessary to constitute the crime charged in the indictment. That the goods mentioned were stolen goods, and that the defendant received them, knowing them to be such, were material facts to be alleged and proved, because they are the facts which constitute the offence; but the time and place of stealing the goods need not be alleged, because the defendant is not charged with the larceny. If it were necessary, by averment and proof, to connect the time and place of the stealing with the act of receiving, it would for the same reason be necessary also to connect the same circumstances with his knowledge of the fact that the goods were stolen. If such were the law no offender could be convicted under this statute without proof, not only of his having received stolen goods knowing them to be such, but also of his knowledge of the precise time and place of the original larceny. And yet it is easy to conceive a case in which a man might be guilty of the offence of knowingly receiving stolen goods, without either the offender or the witnesses having any knowledge of the time and place of the felonious taking. If these positions be correct it clearly follows that any evidence which might have arisen in this case, going to show the time and place of the original larceny, was unnecessary to support the charge in the indictment."

As the *guilty knowledge* is the gist of the offence, it is obviously essential that the averment of it should be correctly made. Where an indictment against a receiver, who was tried with the principal, contained a defective statement that the receiver knew the goods to have stolen, omitting the word "been," the Judges thought the indictment to be bad, this being the gist of the offence; but they afterwards took time to consider. *Rex v. Kernon*, 2 Russell on Crimes, 562. 4th ed. But in *Redman's Case*, 1 Leach C. C. (4th ed.) 477, a similar averment was held to be sufficient. And where an indictment charged the defendant, by the name of "Francis Morris," with receiving stolen goods, "the said *Thomas Morris* well knowing," &c.; it was held that the words, "the said *Thomas Morris*," might be rejected as surplusage; for the allegation of knowledge would then be perfectly consistent with the preceding matter. *Rex v. Morris*, 1 Leach C. C. (4th ed.) 109. See also *Regina v. Crespin*, 11 Queen's Bench, 913; *Commonwealth v. Randall*, 4 Gray, 36. In a recent case a count alleged that the prisoner received the goods of A. B., "he the said A. B. then knowing them to have been stolen." Upon motion in arrest of judgment, the count was held to be fatally defective for the want of a scienter. *Regina v. Larkin*, Dearsly C.

C. 365; 6 Cox C. C. 377. Lord Campbell C. J. said: "How can the name be struck out? The next antecedent to which the word 'he' refers would still be the prosecutor and not the prisoner. In *Rex v. Morris*, ubi supra, it was a mere misnomer; the party was rightly described as to his surname, but not as to his Christian name." And where the statute makes punishable a person "who shall buy, conceal, or receive any stolen goods and chattels, knowing the same to be stolen, *with intent to defraud the owner*," &c.; this intent of course must be alleged in the indictment. *Pelts v. The State*, 3 Blackford, 28. And see *Hurell v. The State*, 5 Humphreys, 68.

The Revised Statutes of Massachusetts, ch. 126, § 20, enacts that "Every person who shall buy, receive, or aid in the concealment of any stolen money, goods, or property, knowing the same to have been stolen, shall be punished," &c. This section describes only one offence which may be committed either by buying, receiving, or aiding in the concealment of stolen goods; and an indictment charging a defendant with buying, receiving, and aiding in the concealment of such goods, charges only one offence. *Stevens v. The Commonwealth*, 6 Metcalf, 241. *The State v. Nelson*, 29 Maine, 329. But see *contra*, *The State v. Murphy*, 6 Alabama, 845. Where an indictment charges a defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describes each article, and avers the value thereof, and he pleads that he is "guilty of receiving fifty dollars' worth of said property, in manner and form as set forth in the indictment," no valid judgment can be rendered against him on such plea. *O'Connell v. The Commonwealth*, 7 Metcalf, 460. The indictment must allege that the property was received with a felonious or fraudulent intent. *The People v. Johnson*, 1 Parker C. C. 564.

In New York in an indictment upon a statute of that State, which enacts that "every person who shall buy, or receive in any manner, *upon any consideration*, any personal property," &c. it is not necessary to allege that the property stolen was received upon any consideration passing between the thief and the receiver. *Hopkins v. The People*, 12 Wendell, 76. "It is obvious," said Nelson C. J., "that the intent and meaning of the act is to make it an offence for any person to buy or receive in any manner, or upon any consideration, goods, knowing them to be stolen; and so the section was reported by the revisors. The buying or receiving goods *upon a consideration* was, no doubt, specified particularly with a view to rebut any pretence that might be set up by way of defence, that the goods were purchased for a valuable consideration. It would be strange indeed that the legislature should have intended to restrict the offence to cases where the property was received upon consideration passing between the thief and receiver, and not embrace cases where it was received without consideration. The offence is the receiving of goods knowing them to have been stolen; and whether received upon or without consideration, does not affect the criminality of the act."

In *The State v. Watson*, 3 Rhode Island, 114, it is decided that in an indictment for receiving stolen goods it is not requisite to assign a money value to every article received. It is sufficient if the description of the goods be such as to show that they are of some value. The indictment alleged that all the articles collectively were of the value of seventy dollars. The jury found by their verdict that the defendant received only a part of the articles enumerated. *Staples*

C. J. delivered the opinion of the court: "Unless there be some intrinsic value in a thing, no person taking it can be guilty of theft; nor can a person be guilty of receiving a thing as stolen, knowing it to be stolen, unless it be a thing the taking of which would be theft. The description in the indictment, of which the jury found that the defendant did receive, knowing them to be stolen, imported an intrinsic value in them.<sup>1</sup> The jurisdiction of this court over this offence does not depend on the value of the stolen goods received. If they are of any value the court has jurisdiction. It was not necessary to allege or prove any specific value, in order to confer jurisdiction on the court. The common-law jurisdiction between grand and petit larceny has been long abolished in this State. It was not necessary therefore to allege or prove any specific value, in order to define the offence committed; and as the punishment does in no sense depend on the value, it was not necessary to allege or prove any specific value in order to the infliction of the kind or amount of punishment. There seems therefore no reason for burdening the record with allegations of the value of goods stolen, if the description of them be such as to show that they were of some value."

The *State v. Watson* is partially in conflict with the well-considered and correctly decided case, *Hope v. The Commonwealth*, 9 Metcalf, 134. "The well-settled practice," said Dewey J., "has been that of stating in the indictment the value of the article alleged to have been stolen. Such is the rule, as stated in 2 Hale P. C. 182; 3 Chitty Crim. Law (4th Amer. ed.) 947 a; 1 Ibid. 238; and *Commonwealth v. Smith*, 1 Massachusetts, 245. The reason for requiring this allegation and finding of value may have been originally that a distinction might appear between the offences of grand and petit larceny, in reference to the extent of punishment; that being graduated in some measure by the value of the article stolen. Our statutes prescribe the punishment for larceny with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long-established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment, and that where an indictment alleges a larceny of various articles, and adds only the collective value of the whole, such allegation is not sufficient where the defendant is not found guilty of the larceny of the whole."

An indictment against A. B. as principal and C. D. as accessory, charged that A. B. "feloniously did steal, take and carry" certain goods, omitting the word "away," and that C. D. received and concealed said goods "*so as aforesaid feloniously stolen, well knowing them to have been stolen, taken, and carried away as aforesaid.*" The omission of the word "away" was held to render the indictment insufficient to support a conviction against either defendant. *Commonwealth v. Adams*, 7 Gray, 43. But an indictment for a substantive felony, is sufficient which alleges that the goods were "feloniously stolen," and that the defendant received them "knowing the same to have been feloniously stolen," is sufficient, without adding the words "taken and carried away." *Commonwealth v. Lakerman*, 5 Gray, 82.

An indictment upon the 7 & 8 Geo. IV. ch. 29, § 55, for receiving goods which have been obtained by false pretences, must allege the goods to have been obtained by false pretences, and that the receiver knew that they were so ob-

<sup>1</sup> The value of this case is impaired from the fact, that the indictment is not set out in the report.

tained. The indictment stated that the prisoner unlawfully did receive of a certain evil-disposed person one shoulder of mutton of the weight of seven pounds of the value, &c. of the goods and chattels of T. W., which said goods and chattels had been then lately before, to wit, on &c. at &c. unlawfully obtained, taken and carried away, she the prisoner at the time of her so receiving the said goods and chattels well knowing the said goods and chattels to have been unlawfully obtained, taken and carried away: after a verdict of guilty it was moved in arrest of judgment that the offence was not brought within the 7 & 8 Geo. IV. ch. 29, § 55, unless it appeared in the indictment that the goods had been obtained by false pretences, and that the receiver knew them to be so unlawfully obtained; and, upon a case reserved, the Judges were unanimously of the opinion that the indictment was bad, on the ground stated in the motion in arrest of judgment. *Regina v. Wilson*, 2 Moody C. C. 52. And it has been held that an indictment for receiving goods obtained by false pretences must allege the false pretences in the same manner as an indictment for obtaining the goods by false pretences, and if it do not it is bad on demurrer or motion to quash. *Regina v. Hill*, 2 Russell on Crimes, 554. 4th ed.

With respect to the form of the indictment it is further to be observed that in the case of *Rex v. Galloway*, 1 Moody C. C. 234, and in *Rex v. Madden*, 1 Moody C. C. 277; 1 Lewin C. C. 83, it was decided by the Judges unanimously, that it was no objection in point of law that an indictment charges prisoners in one count as principals in stealing the goods, and in another as receivers; but the Judges were equally divided on the question, whether the prosecutor should not have been put to his election, and thereupon they all agreed that directions should be given to the respective clerks not in future to put both charges in the same indictment.

A principal and accessory may be indicted jointly or separately. 1 Hale P. C. 623. *Foster Crown Law*, 365. *Commonwealth v. Adams*, 7 Gray, 43. The felony of the principal is as distinct from the felony of the accessory, as the felony of one receiver from the felony of another receiver, and there is stronger ground for the principal and receiver being tried separately, than for separate receivers being tried separately, inasmuch as evidence may be admissible against the principal, which is not admissible against the receiver; *Rex v. Turner*, 1 Moody C. C. 347; and the receiver may be prejudiced by the reception of such evidence. Where a principal and a receiver are included in the same indictment, the receiver may be charged in one count with receiving the goods from the principal, and in another count with a substantive felony for receiving them from an evil-disposed person. The indictment charged four prisoners with a burglary and stealing a number of articles, and the fifth prisoner with receiving a part of the stolen goods from the other prisoners, and another count charged the fifth prisoner with a substantive felony in receiving the same part of the goods from a certain evil-disposed person. Parke B.: "There was an objection taken on the ground of a misjoinder of counts, where a count for receiving was added as for a substantive felony. I had some doubt on the point; but I have conferred with my Brother Bollard, and looked at authorities, and I now find that it is a matter quite in the discretion of the judge. It is not open to a demurrer; neither is it a ground for quashing the indictment. Therefore whenever it is clear that there is only one offence, and the joinder of the counts cannot prejudice the

prisoner, we think that the objection ought not to prevail." *Rex v. Austin*, 7 Carrington & Payne, 796. In *Rex v. Hartall*, 7 Carrington & Payne, 475, a count charging Hartall and Neal with a burglary and stealing sundry articles, and Mole with receiving part of the articles stolen, and Horseman with receiving other part of the articles, was joined with a count charging Mole and Horseman with the substantive felony of jointly receiving all the articles, and with counts charging Mole and Horseman separately with a separate substantive felony, in each separately receiving a part of the articles stolen. And it appeared that Mole and Horseman had received part of the stolen property on different occasions, and quite unconnectedly with one another; it was objected, that as distinct felonies had been committed by Mole and Horseman, each ought to have been tried separately; but Littledale J. held that all the prisoners might be convicted upon this indictment. In *Regina v. Hayes*, 2 Moody & Robinson, 155, the prisoners were indicted for stealing a sheep, and two others separately in distinct counts for receiving separate parts of the mutton so stolen, and all the prisoners were found guilty. It was moved in arrest of judgment on the part of the receivers, on the ground that they were charged with separate felonies, for which they ought to have been indicted separately. Parke B.: "The objection forms no ground for a motion in arrest of judgment. If there had been any thing in the point, you ought to have asked me to put the prosecutor to his election, if justice had required the separation, while the trial was going on; but you can take no advantage of the objection after verdict." But where some prisoners are indicted as principals and some as receivers, and the indictment contains, as it well may; *Rex v. Austin*, 7 Carrington & Payne, 796; separate counts against each receiver for a substantive felony, although all the principals are acquitted, the receivers may be convicted and sentenced. An indictment charged three prisoners with stealing a carpet bag and a number of articles therein contained, and two other prisoners with receiving separately certain of the goods so stolen as aforesaid, and there were two other counts, each of them charging one of the two last-mentioned prisoners with a substantive felony in separately receiving portions of the same goods, and the jury acquitted the three principals, but found the receivers guilty; it was moved, in arrest of judgment, that the principals having been acquitted, no judgment could be given against the receivers; that a larceny committed by another person could not be given in evidence upon this indictment, and although a count for a substantive felony might be inserted, such count was only introduced to prevent an acquittal, if it turned out that the property was received from some other person, but still the principal must be proved to have committed the felony; but Gurney B. overruled the objection, and judgment was given against the receivers. *Regina v. Pulham*, 9 Carrington & Payne, 80.

A count charging a person with being accessory before the fact may be joined with a count charging him with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, as the party may be found guilty upon both. *Regina v. Blackson*, 8 Carrington & Payne, 43, Parke B. and Patteson J. And so a count charging the prisoner as accessory before the fact may be joined with a count for receiving, and the prisoner may be convicted on both. Erle C. J. "Upon this evidence the jury might reasonably and logically convict the prisoner of stealing as an accessory before the fact, and there is no inconsistency in saying that he is guilty of being an

accessory before the fact, and that he received the goods knowing them to have been stolen." *Regina v. Hughes*, Bell C. C. 242; 8 Cox C. C. 278. A count charging the prisoner as principal may be joined with a count for receiving, and the prisoner may be convicted on both. *Regina v. Blackson*, *ubi supra*. *Commonwealth v. O'Connell*, 12 Allen, 451. And a case has occurred in which a party was indicted for receiving stolen goods, and also for receiving, harboring and comforting the felons, and the prisoner was convicted. Anonymous, mentioned by Parke B. in *Regina v. Blackson*, 8 Carrington & Payne, at p. 44. In many cases it is advisable to insert such counts, as the evidence may fail to prove the receipt of the stolen property, and yet may be sufficient to obtain a conviction for comforting and assisting the felon.

In America it has been held that counts for stealing and receiving stolen goods may be joined in the same indictment, and although in his *discretion* the judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts cannot prejudice the defendant. *Hampton v. The State*, 8 Humphrey, 69. *The State v. Hazard*, 2 Rhode Island, 474. *Weinzorfflin v. The State*, 8 Blackford, 186. In *Hampton v. The State*, above cited, the indictment contained two counts, one for stealing, the other for receiving. The motion to compel an election was made before plea pleaded, and it was held that it is discretionary with the court either to quash the indictment or compel an election; but that it is no ground for error or motion in arrest of judgment.

In *Regina v. Perkins*, 2 Denison C. C. 459, it was decided that a principal in the second degree, *particeps criminis*, cannot at the same time be convicted as a receiver. Alderson B. "If one burglar stands outside a window while another plunders the house, and hands out the goods to him, he surely could not be indicted as a receiver." "This case," says Mr. Greaves, "must not be taken to decide that a principal cannot, under any circumstances, be a receiver, as the marginal note would seem to indicate. If a principal were to deliver the goods to another, and afterwards at a distance from the place where the felony was committed were to receive them again, there can be no doubt that he might be convicted as a receiver." 1 Russell on Crimes, 53 note. 4th ed. And where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in stealing. *Regina v. Hilton*, Bell C. C. 20. In *Regina v. Perkins* it was stated as a fact that the prisoner was a principal. The jury negated that in *Regina v. Hilton*.

If two persons are charged jointly with receiving stolen goods, a joint act of receiving must be proved; and proof that one received in the absence of the other and afterwards delivered to him will not suffice. Successive receivers are all separate receivers, and all punishable as such. *Rex v. Messingham*, 1 Moody C. C. 257. The case of *Regina v. Dovey*, 2 Denison C. C. 86, and other cases subsequent to that of *Rex v. Messingham*, explain and illustrate the principle and the extent to which it is to be carried in the matter of charging a joint felony in receiving stolen goods, knowing them to be such. To sustain a joint charge against two for one and the same offence, there must be a joint receipt at one and the same time; and a receipt of goods by one of the parties at one

time and place, and a subsequent receipt by another, will not sustain the joint charge, but will authorize the conviction of the party who first received them. He is properly found guilty of the offence of receiving stolen goods. So the entire acquittal of one of two parties charged exonerates that party, but leaves the indictment valid and effectual as against the one found guilty by the jury. There is nothing in this class of cases to take them out of the ordinary rule of entering judgment of conviction against a party found guilty by the jury, where the evidence has been found insufficient to sustain the indictment against another alleged participator. *Commonwealth v. Slate*, 11 Gray, 60. *Regina v. Matthews*, 1 Denison C. C. 596. *The State v. Smith*, 37 Missouri, 58. *Regina v. Rear-don*, Law Rep. 1 C. C. 31; 10 Cox C. C. 241.

A person receiving, at the same time and in the same package, a quantity of stolen goods, the property of several persons, knowing them to have been stolen, is guilty of several offences, for which there may be several indictments and convictions. *Commonwealth v. Andrews*, 2 Massachusetts, 409. Or a single count may embrace the whole. *The State v. Nelson*, 329.

In an indictment against a married woman, for receiving stolen goods, it is unnecessary to aver that, at the time, she was not acting under the coercion of her husband. *The State v. Nelson*, 29 Maine, 329.

### COMMONWEALTH *v.* McDONALD.<sup>1</sup>

March Term 1850.

#### *Attempt to commit Larceny by Stealing from the Person.*

In an indictment for an attempt to commit a larceny from the person of an individual by picking his pocket, it is not necessary to allege or prove, that such party, at the time of the attempt, had any thing in his pocket, which could be the subject of larceny.

THE defendant was indicted in the Municipal Court, and there tried before Mellen J. for an attempt to commit a larceny from the person.

The indictment alleged, that the defendant, on the 19th of May 1849, at Boston in this county, "did attempt to commit an offence prohibited by law; to wit, did attempt, with force and arms, to steal feloniously and take and carry away from the person of a certain man, whose name to said jurors as yet is not known, his personal property, then in his pocket and in his possession, the name of said property not being known to said jurors,

<sup>1</sup> 5 Cushing, 365.

and the value of said property not being known to said jurors, that being an offence prohibited by law, and in such attempt did then and there do a certain overt act towards the commission of said offence; to wit, did then and there, with force and arms, feloniously, and with intent then and there feloniously to steal, take, and carry away said person's said property, then and there being in his pocket on his person, thrust, insert, put, and place his said McDonald's hand into the pocket privily and secretly of said man, without his knowledge and against his will, but said McDonald then and there did fail in the perpetration of said offence of stealing from the person of said man, and was intercepted and prevented in the execution of the same, against the peace, &c."

At the trial, there being no evidence on the part of the prosecution, that the individual, from whom the defendant was charged with an attempt to steal, had any property upon his person, at the time of the alleged attempt, the defendant asked the judge to rule, that the indictment could not be sustained.

The defendant also objected, that the indictment, not containing any allegation that the party had any property upon his person, was wholly insufficient in law.

But the presiding judge ruled otherwise upon both points, and the jury thereupon returning a verdict of guilty, the defendant excepted.

*T. Willey*, for the defendant.

*Clifford*, Attorney General, for the Commonwealth.

FLETCHER J. This is an indictment against the defendant on the twelfth section of the one hundred and thirty-third chapter of the Revised Statutes, which provides, that "Every person, who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act toward the commission of such offence, but shall fail in the perpetration, or shall be interrupted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows," &c.

It is insisted, on the part of the defendant, that the indictment should have set out particularly the property of the unknown person, which the defendant attempted to steal, with an allegation of its value; and his counsel endeavors to maintain this proposition, by arguments and authorities applicable to indictments for larceny.



But the offence charged in this indictment is a peculiar statutory offence, entirely different and distinct from that of larceny; so that arguments and authorities applicable to the one are wholly inapplicable and irrelevant to the other.

By the statute, every person, who shall attempt to commit an offence prohibited by law, and shall in such attempt do any act towards the commission of such offence, but shall fail in the perpetration, may be indicted and punished. In the present case, the indictment charges, that the defendant attempted to steal from a person unknown, which was an act prohibited by law, and in such attempt did an act towards the commission of such offence, by thrusting his hand into the pocket of such unknown person, and that he failed in the perpetration of the offence. These are all the facts which the statute requires to be alleged and proved, in order to make out this statutory offence.

As the punishment of stealing from the person does not depend on the amount stolen, there was no occasion for any allegation as to value in this indictment. It was not necessary to describe the particular goods attempted to be stolen, nor was it necessary that there should have been any thing in the pocket of the unknown person which could have been stolen. The offence was complete by the general attempt to steal, and the act done towards the commission of the offence by the defendant, by thrusting his hand into the pocket of the unknown person. It was not an intent merely; by the act done it became an attempt.

But it was said in argument for the defendant, that he could not be said to have attempted to steal the property of the unknown person, if there was no property to be stolen; and that therefore the indictment should have set out the property and shown the existence and nature of it by the proof. But it will appear, at once, by a simple reference to the import of the term "attempt," that this proposition cannot be maintained. To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains nevertheless chargeable with the attempt, and with the act done towards the commission of the theft. So a man may make an attempt, an experiment, to pick a pocket, by thrusting his hand into it, and not succeed, because there hap-

pens to be nothing in the pocket. Still he has clearly made the attempt, and done the act towards the commission of the offence. So in the present case, it is not probable, that the defendant had in view any particular article, or had any knowledge whether or not there was any thing in the pocket of the unknown person; but he attempted to pick the pocket of whatever he might find in it, if haply he should find any thing; and the attempt, with the act done of thrusting his hand into the pocket, made the offence complete. It was an experiment, and an experiment which, in the language of the statute, failed; and it is as much within the terms and meaning of the statute, if it failed by reason of there being nothing in the pocket, as if it had failed from any other cause. The following cases fully support the view taken in this case, and I am not aware of any opposing authorities. *The King v. Higgins*, 2 East, 5. *The People v. Bush*, 4 Hill, 133. *Josslyn v. The Commonwealth*, 6 Metcalf, 236. *Rogers v. The Commonwealth*, 5 Sergeant & Rawle, 463.

This decision is confined to the particular case under consideration, of an attempt to steal from the person; as there may perhaps be cases of attempts to steal, where it would be necessary to set out the particular property attempted to be stolen, and the value. It not being necessary, in the present case, to set out in the indictment the property attempted to be stolen, the defendant's exception to the ruling of the judge, that there need be no evidence of any property in the pocket of the unknown person, cannot, of course, be sustained, unless such evidence was made necessary by the allegations in the indictment.

The indictment alleges that the defendant attempted to steal from the unknown person his personal property then in his pocket, and in his possession, neither the name nor the value of the property being known to the jurors. But this allegation is wholly unnecessary and immaterial, and may be stricken out; and the indictment will still remain sufficient, and contain all the allegations necessary to make out the offence against the defendant, and to warrant the conviction.

It not being necessary to allege, that there was any thing in the pocket of the unknown person, and as all that part of the indictment may be stricken out, the ruling of the court, that there need be no evidence of any property in the pocket of the person was correct, and is fully supported by authority. *Roscoe Crim. Ev.* 100.

*Exceptions overruled.*

REGINA v. COLLINS.<sup>1</sup>

. 1864.

*Attempt to commit Larceny by Stealing from the Person.*

There can only be an attempt to commit an act, when there is such a beginning as, if uninterrupted, would end in the completion of the act.

The prisoner was indicted for attempting to commit a felony by putting his hand into A.'s pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket; but there was no proof that there was any thing in the pocket.

*Held*, that, on the assumption that there was nothing in the pocket, the prisoner could not be convicted of the attempt charged.

THE following case was reserved by the Deputy Assistant Judge of the Middlesex Sessions.

The prisoners were tried before me at the Middlesex Sessions on an indictment which stated that they unlawfully did attempt to commit a certain felony, that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then being, from the person of the said woman to steal, &c.

The evidence showed clearly that one of the prisoners put his hand into the gown pocket of a lady, and that the others were all concerned in the transaction. The witness who proved the case said, on cross-examination, that he asked the lady if she had lost any thing, and she said, "No."

For the defence it was contended that to put a hand into an empty pocket was not an attempt to commit a felony, and that, as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was not; and, as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence.

I declined to stop the case upon this objection; but, as such cases are of frequent occurrence, I thought it right that the point should be determined by the authority of the Court of Criminal Appeal.

<sup>1</sup> Leigh & Cave C. C. 471. 9 Cox C. C. 497.

The jury found all the prisoners guilty ; and the question upon which the opinion of your Lordships is respectfully requested is, whether under the circumstances the verdict is sustainable in point of law.

The prisoners are in custody awaiting sentence.

This case was argued on the 4th of June 1864, before COCKBURN C. J., WILLIAMS J., MARTIN B., CROMPTON J. and BRAMWELL B.

*Poland*, for the prisoners. — There is no doubt that the prisoners would be punishable under the Vagrant Acts as suspected persons frequenting a street with intent to commit felony ;<sup>1</sup> but the offence laid in the indictment is not made out ; for there was no property in the lady's pocket.

MARTIN B. It never was proved that there was no property there.

CROMPTON J. *It is important to notice how the indictment was framed.* The prisoners are charged with putting their hands into the pocket "with intent the property of the said woman, *in the said gown pocket then being*, from the person of the said woman to steal."

*Poland.* In *Regina v. M'Pherson, Dearsly & Bell* C. C. 197, the prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods, specified in the indictment, the property of the prosecutor. At the time of the breaking and entering, the goods specified were not in the house, but there were other goods there, the property of the prosecutor. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein. This court however held that the conviction was wrong, as there was no attempt to commit the "felony charged" within the meaning of the 14 & 15 Vict. ch. 100, § 9. In the course of the argument of that case Bramwell B. says (*Dearsly & Bell* C. C. at p. 201) : "The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal appeared to me at first plausible ; but suppose a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be ?" Again Cockburn C. J., in delivering judgment, says (*Dearsly*

<sup>1</sup> See the 5 Geo. IV. ch. 83, § 4.

& Bell C. C. at p. 202) : “ The word ‘ attempt ’ clearly conveys with it the idea that, if the attempt had succeeded, the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there ; but attempting to commit a felony is clearly distinguishable from intending to commit it.” This case is the same, and it is submitted there is a clear distinction between the intent to steal (for which the prisoners were punishable under the Vagrant Act) and an attempt to steal. If the goods had not been specified as “ in the said gown pocket then being,” an indictment might perhaps have been framed which would have been supported by the evidence.

BRAMWELL B. Did not the prisoner furnish evidence against himself by putting his hand into the pocket ? Can you not infer something from that ?

*Poland.* It was a mere voyage of discovery. As in the case of the log of wood, an intent to murder would not be an attempt to murder ; so, in the case of an empty pocket, an intent to steal would not amount to an attempt to steal. In *Rex v. Scudder*, 3 Carington & Payne 605 ; 1 Moody C. C. 216, on an indictment for administering a drug to a woman to procure abortion, *she not being quick with child*,<sup>1</sup> it appeared from the evidence that the woman was not with child at all ; whereupon it was held by the twelve Judges that the conviction was wrong, although it was proved that the prisoner thought she was with child, and gave her the drug, with intent to destroy the child.

COCKBURN C. J. The prisoner had a double purpose, first, to ascertain if there was any thing in the pocket ; secondly, to take it if there was.

MARTIN B. He attempted to steal something, but was foiled because there was nothing.

*Metcalf*, for the Crown. When an intent is shown, any overt act coupled therewith will amount to an attempt. There would be no such overt act in shooting at a log ; it would be altogether a mistake. This case would be more like shooting at a person in chain-armor.

COCKBURN C. J. No ; this case would have resembled shooting at a man in chain-armor, if there had been a purse tied in the

<sup>1</sup> The language of the statute is now altered. See the 24 & 25 Vict. c. 108, s. 58.

lady's pocket. There must be an attempt which, if successful, constitutes the full offence. Suppose a man were to go into a house without breaking and entering it, with intent to steal, and were to find the house empty, could he be convicted?

*Metcalfe.* It is submitted that he could be, if it were a place where goods were usually deposited.

CROMPTON J. Suppose a man were to buy a pistol with intent to rob and murder another in a lane, and the man who was to be murdered never came, the intent would not be enough without the attempt.

COCKBURN C. J. We are of opinion that this conviction cannot be supported, and in so holding it is necessary to observe that, from the case submitted to us, the question of whether there was any thing in the pocket of the woman which might have been the subject of larceny if the prisoner had not been interrupted, does not appear to have been left to the jury. The question we are asked seems to be whether an attempt at larceny can be committed by a person putting his hand into another's pocket for the purpose of committing a larceny, there being at the time nothing in the pocket. Now, we are far from saying that, if the question whether there was any thing in the pocket had been laid before the jury, there was not evidence upon which they might have found in the affirmative; but that question not having been put, we are of opinion that, assuming the fact to be that there was nothing in the pocket of the woman, the offence could not be committed. The question might have been submitted to the jury, and they might have found that there was something in the woman's pocket, but, that not having been done, the conviction cannot be sustained.

*Conviction quashed.*

The principle which is so fully discussed in the principal cases, is admirably stated by Mr. Justice Gray in *Commonwealth v. Jacobs*, 9 Allen, at p. 275: "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance. Upon this principle, on an indictment under a statute against passing or disposing of forged bank-notes with intent to defraud, it has been held no defence that those to whom the notes were passed knew them to be forged, and therefore could not be defrauded. *Rex v. Holden*, Russell & Ryan C. C. 154. *Commonwealth v. Starr*, 4 Allen, 301.

So a statute making it felony to administer poison or use any instrument 'with intent to procure the miscarriage of any woman,' extends to a case in which the woman is not pregnant. *Regina v. Goodchild*, 2 Carrington & Kirwan, 293. And under a statute for the punishment of any one attempting to commit an offence, and failing or being interrupted in its execution, an indictment for an attempt to steal from the person is not defeated by proof that he had nothing in his pocket. *Commonwealth v. McDonald*, 5 Cushing, 365. *Rogers v. The Commonwealth*, 5 Sergeant & Rawle, 464. *The State v. Wilson*, 30 Connecticut, 505. In the case before us, the indictment alleges, the evidence showed, and the jury have found, that the defendant enticed and solicited a citizen of this Commonwealth to leave it for the purpose of enlisting elsewhere. The act of enticing him away and the unlawful purpose being alleged and proved, and there being no evidence that his unfitness for military service was manifest or known at the time of this unlawful act, the fact that he had previously been or afterwards was rejected by the military authorities did not diminish the defendant's crime, under the statute on which the indictment was framed."

In delivering the judgment in *The State v. Wilson*, 30 Connecticut, 500, Butler J. at p. 506, said: "In *Commonwealth v. McDonald* it is true the indictment was found upon a special statute, but that statute was in affirmance of the common law, as in force and recognized in this State; and the same principles were involved. A similar case has been decided in Pennsylvania, *Rogers v. The Commonwealth*, 5 Sergeant & Rawle, 463, and a case differing as to the facts, but involving like principles upon a like statute in New York. *The People v. Bush*, 4 Hill, 133. Indeed, upon principle, it would be a novel and startling proposition that a known pickpocket might pass around in a crowd, in full view of a policeman, and even in the room of a police station, and thrust his hands into the pockets of those present with intent to steal, and yet not be liable to arrest or punishment. The statement of such a proposition is a sufficient refutation of it; and the only safe rule is, that the attempt is complete and punishable when an act is done with intent to commit the crime which is adapted to the perpetration of it, whether the purpose fails by reason of interruption, or because there was nothing in the pocket, or for other extrinsic cause."

In *Commonwealth v. McDonald*, the defendant was held to be rightly convicted of an attempt to steal from the person, in picking a pocket, although there was no evidence that any thing was in the pocket. So he might intend to defraud in uttering a counterfeit note, though the person to whom he delivered it for the purpose of obtaining money or other property in exchange had no property of his own of which he could be defrauded. *Commonwealth v. Starr*, 4 Allen, 301.

Mr. Bishop, in his *Commentaries on the Criminal Law*, Vol. I. § 671, writes:

"When we come to the facts of cases, we find that different Judges have taken somewhat dissimilar views of this subject; or, in other words, that the cases are conflicting and confused. To illustrate: In 1864, some defendants having been, in England, convicted of an attempt to commit larceny from the person of a woman, by picking her pocket, the conviction was held by the Judges to be wrong, because it did not affirmatively appear, on the trial, that there was any money or other thing in the pocket; and indeed this question was not submitted, as the Judges said it should have been, to the jury. *Regina v. Collins*. But, in 1846, the statute

of 7 Will. IV. & 1 Vict. ch. 85, § 6, having provided, 'that whosoever, with intent to procure the miscarriage of any woman, shall (among other things) unlawfully use any instrument,' should be punished in a way pointed out, the Judges then presiding held a defendant to be guilty, though the evidence showed affirmatively that the woman, supposed to be pregnant, was not so in fact. *Regina v. Goodhall*, 1 Denison C. C. 187; s. c. *Regina v. Goodall*, 2 Cox C. C. 40; s. c. *Regina v. Goodchild*, 2 Carrington & Kirwan, 298.<sup>1</sup> The acutest understanding could not reconcile these two cases, — the one, for putting the hand into the pocket, and not finding there any thing to be removed; the other, for penetrating to the womb, and there finding no embryo or fœtus, — and the different decisions must be attributed to the differing views of different benches of Judges. But he who adopts the line of argument indicated in our last section will find it easy to choose between these two opposite decisions. It being, in the outset, settled, that the defendant deserves punishment by reason of his criminal intent, we have no difficulty in saying that the protection of the public requires the punishment of persons who do these forbidden acts, equally whether it turns out that there was a fœtus or money to be removed, which the defendant did not succeed in removing; or that the party undertaking to remove the thing, and supposing it to exist, found nothing."

Obviously the decision in *Regina v. Goodhall* was required by the express language of the statute.<sup>2</sup> And it is equally obvious that the decision in *Regina v. Collins* was required by the express language of the indictment. The two cases are thus reconciled. During the argument in *Regina v. Collins*, Crompton J. said, ante p. 479: "It is important to notice how the indictment is framed. The prisoners are charged, with putting their hands into the pocket 'with intent the property of the said woman *in the said gown pocket then being* from the person of the said woman to steal.'" As the putting a hand into a pocket with intent to steal is clearly an act accompanied by a criminal intent, though there be nothing in the pocket, it is a common-law misdemeanor, and a count should in cases of this kind be framed to meet this view of the case. And the counsel for the prisoner argued "if the goods had not been specified as in the said gown pocket then being, an indictment might perhaps have been framed which would have been supported by the evidence." Cockburn C. J.: "This case is governed by *Regina v. M'Pherson*, Dearsly & Bell C. C. 197; 7 Cox C. C. 281. That case proceeds on the ground that you must prove the property as laid." 9 Cox C. C. at p. 499.

<sup>1</sup> This case is reported, ante p. 446.

<sup>2</sup> The statute 24 and 25 Vict. ch. 100, in terms makes it immaterial whether the woman was or was not with child, in accordance with the decision in *Regina v. Goodhall*.



REGINA v. BALDRY.<sup>1</sup>

April 24, 1852.

*Confessions.*

A police constable, who apprehended a man on a charge of murder, having told him the nature of the charge against him, said "he need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him." The prisoner thereupon made a confession. *Held*, that the confession was rightly admitted in evidence.

*Regina v. Drew*, 8 Carrington & Payne, 140; *Regina v. Morton*, 2 Moody & Robinson, 514; *Regina v. Furley*, 1 Cox C. C. 76; and *Regina v. Harris*, 1 Cox C. C. 106, are overruled.

At the Spring Assizes for the county of Suffolk, the prisoner was tried before LORD CAMPBELL C. J. upon an indictment charging him with having administered poison to his wife, with intent to murder her.

On the part of the prosecution, a police constable was called, whose evidence thus began: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say any thing to criminate himself; what he did say would be taken down and used as evidence against him.*" Objection was made, on behalf of the prisoner, that what he then said was not admissible.

The Lord Chief Justice thought that, although the caution of the constable differed from that directed by 11 & 12 Vict. ch. 42, § 18, to be given by the justice to the prisoner in the word "will," instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could have no tendency to induce him to say any thing untrue; and that, in spite of it, if he did afterwards confess, the confession must be considered voluntary. His lordship therefore allowed the witness to give in evidence what the prisoner then said, which amounted to a confession of his guilt. But as doubts had been entertained by learned Judges, whether a confession, after such a caution, might lawfully be given in evidence, his lordship reserved the question for the Court of Criminal Appeal.

<sup>1</sup> 2 Denison C. C. 430. 5 Cox C. C. 523.

The prisoner was convicted, and sentence of death was passed upon him.

On the 24th April 1852, this case was argued before LORD CAMPBELL C. J., POLLOCK C. B., PARKE B., ERLE J. and WILLIAMS J.

*H. Mills*, for the prisoner. It is proposed, on behalf of the prisoner, to substantiate the objection raised at the trial; and the question is, whether the words addressed by the constable to the prisoner held out to him the promise or assurance of any worldly advantage to himself, in regard to the charge, as the consequence of making a statement, or a threat of harm to himself, as the consequence of refraining from doing so; if so, a confession, made on the strength of these words, would be inadmissible in evidence.

LORD CAMPBELL C. J. That is the question.

*Mills*. If made in consequence of such an inducement, it may be a false charge, made by the prisoner against himself, and unworthy of judicial notice. It is said in 2 Russell on Crimes, 826, that a confession, in order to be admissible, must be "free and voluntary;" that is, it must not be extracted by *any sort* of threat or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence. The ground on which it is supposed to be unworthy of credit is stated by Eyre C. J. in Warickshall's Case, 1 Leach C. C. (4th ed.) 263. There is another proposition also laid down in Russell. "The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner; and therefore excludes the declaration if *any* degree of influence has been exerted." It is gathered from this, that if any inducement, of the slightest description, whereby any worldly advantage to himself, as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue.

POLLOCK C. B. You are overstating it. The law does not presume that it is untrue; but rather that it is uncertain whether a statement so made is true.

LORD CAMPBELL C. J. I doubt whether the rule excluding confessions made in consequence of an inducement held out, proceeds upon the presumption that the confession is untrue; but rather that it would be dangerous to receive such evidence; and that, for

the due administration of justice, it is better that it should be withdrawn from the consideration of the jury.

*Mills.* The law assumes that a man may falsely accuse himself upon the slightest inducement. In *Cass's Case*, 1 Leach C. C. 293 note, a confession induced by saying: "I am in great distress about my irons; if you will tell where they are, I will be favorable to you," was held by Gould J. to be inadmissible. The slightest hope of mercy, to induce a prisoner to disclose, is enough to render the statement inadmissible. *Rex v. Thomas*, 6 Carrington & Payne, 353, a case before Patteson J. So also in a case of murder before the same learned judge, *Sherrington's Case*, 2 Lewin C. C. 123, where the words were: "No doubt thou wilt be found guilty, it will be better for you if you will confess," the confession was excluded. In another case of murder, *Rex v. Pulley*, 5 Carrington & Payne, 539, the words: "You had better tell the truth, or it will lie upon you and the man go free," were held to be such an inducement as excluded the confession.

*POLLOCK C. B.* There is no doubt as to the application of the rule in those cases, which are all familiar to the Judges and to the bar.

*Mills.* They are cited for the purpose of showing how the whole law is imbued with the proposition, that any inducement will exclude a confession. The law will not measure the force of the inducement; and the law supposes that there are circumstances in which a man will make a false accusation against himself. In the case of *Regina v. Garner*, 2 Carrington & Kirwan, 920, and 1 Denison C. C. 329, the words: "It will be better to speak the truth," were held to operate in exclusion of the confession. The law says, that if any person (being a person of authority) holds out any thing in the nature of an inducement to a prisoner, it will not permit what he has said under the influence of it to be given in evidence. In the case of *Rex v. Parratt*, 4 Carrington & Payne, 570, the prisoner's confession was excluded in consequence of the following threat: "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face." There is also a MSS. case, 2 Russell on Crimes, 832, *Rex v. Williams*, Gloucester

Spring Assizes 1832, where the prisoner, being in custody on a charge of arson, was told, "That he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed," on which he made a statement. Taunton J. doubted whether the words used might not be construed as a threat, and, having consulted Littledale J., said: "We think, as the words were so ambiguous, that they might be considered by the prisoner as a threat, the evidence ought not to be given." Even impressing a man with the fact that the prosecutors are sure of his guilt, and alarming him so as to make him throw himself on their unpromised mercy, is sufficient to exclude a confession. In the case of *Rex v. Mills*, 6 Carrington & Payne, 146, Gurney B. held that the words, "It is of no use for you to deny it, for there is a man and a boy will swear they saw you do it," rendered the prisoner's statement inadmissible. There is also a case before Parke B., *Regina v. Warringham*, 15 Jurist, 318, where the words, "It is of no use for you to deny it," were held to exclude the confession; but the answers of the witness were confused and contradictory as to whether this language was used by him before or after the confession.

PARKE B. I have sent for my notes of that case.<sup>1</sup>

<sup>1</sup> This case, deciding an important point of evidence, is here inserted in a corrected form. The evidence is taken from the MSS. notes of Baron Parke, who has kindly permitted the editor to use them, and is included within brackets; the arguments stand as in the original report.

#### REGINA v. WARRINGHAM.

Surrey Spring Assizes 1851.

Coram PARKE B.

In order to render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement; if this appear doubtful on the evidence, the confession ought to be rejected.

On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible.

THE prisoner was indicted for stealing a quantity of brown duck, the property of two persons carrying on business in partnership, in whose shop he served. The first witness was one of the prosecutors.

Luke Blakemore. Water-proof clothes manufacturer in Tooley Street. My brother is in partnership. Prisoner was in my employ 24th January. In evening,

*Mills.* The law is suspicious, in the highest degree of confessions; it suspects that it does not get at the truth as to the way in which they are obtained. It is remarked by Blackstone, IV.

he had charge of the goods in the shop. On the 11th March, I missed a piece of duck, thirty-six yards in length, worth 14s. (it was taken 25th February). I accused prisoner, and he made no answer. I went to the station-house; I heard something then spoke to prisoner again. I said, *it is of no use to deny*; I have seen the piece of goods at the station-house. He said, he would not have done it if he had not been persuaded to it. I told him, *it would be best for him* if he would tell how it was transacted, — this not till some time after. I did not say I would not prosecute him; I did not say he should not lose his situation. My brother was present; he did not say any thing.

Cross-examined. I have not been in Horsemonger jail; never in any prison; never had a key turned on me for a day. I was taken to a police station, for selling cherries, a night. It was because I would not move on. I got out at twelve; I was let off. I decline to answer the question as to another time. I was not locked up more than twice. I was not punished. I do not recollect what it was for; three years ago, for the cherries; the other, six or seven years ago, for an assault. I received no punishment. I don't know what kind of assault. Prisoner had been in my employ two months. Brother is not here; I left him at our shop. Brother was in this court in the morning; he went away about eleven, but I will not swear as to the time.

*Locke*, for the prisoner, objected to the admissibility of the confession.

PARKE B. It certainly does not appear that the confession was not made in consequence of an improper inducement.

*W. M. Best*, for the prosecution. It does not appear that the confession *was* made in consequence of such an inducement. If the evidence leaves that fact doubtful, the *onus* does not lie on the prosecution to prove the negative.

PARKE B. Yes, it does. You are bound to satisfy me that the confession, which you seek to use in evidence against the prisoner, was *not* obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not.

This confession was therefore rejected. [I reject the evidence of admission, not being satisfied that it was voluntary. MMS. PARKE B.]

The wife of the other prosecutor was then examined.

Jane Blakemore. Wife of brother of prosecutor. On 11th of March, I said to prisoner, there is a piece of duck lost; do you know any thing about it? He made no answer, but went out. He afterwards beckoned me, and told me if my husband would take William Dear and Bristol Jack, he would tell all. I had said nothing to him before that, he said that night. Prosecutor and the brother had not been to station and returned; they were absent. Then the prisoner told me, that night fortnight, that William Dear had come to the window, and told him he was not half wide awake enough, and that if he could get him a piece of duck, he would put it away for him, and that he, after hesitating, said he would, and that William Dear, Jos. Gillen, and Bristol Jack, would be at turning nearly right opposite, and William Dear was to whistle, and Warringham was to turn his back, and Jos. Gillen was to come in and take the duck away; and that the prisoner did so, and put the

Comm. 357, even in cases of felony, at the common law they are the weakest and most suspicious of all testimony: ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence. The law therefore distrusts confessions in criminal cases. As to the practice in early times, the law is barren of authorities, and little is known of it except by tradition. Lord Coke says nothing upon the subject, and the earliest reference to principle, in regard to the receivability in evidence of confessions, is to a case in *Hardres*, 139, referred to in *Gilbert Ev.* 123 (see *Sedgwick's* edition), where it is said to be contrary to natural justice for a man to be obliged to accuse himself; and the law on the subject seems to be none other than the application of the maxim, *Nemo tenetur prodere seipsum*. The law does not suppose a man to be guilty till he is proved to be so. Presuming therefore that a prisoner is innocent, it imputes to a man that he, being innocent, may, on an inducement, accuse himself falsely; and it says, that duck in the corner, and turned his face when William Dear whistled, and that all the three took it, and Gillen carried it. I did not tell. I told prisoner I would not tell until he told himself. I did not tell prosecutor till prisoner told me something.

Cross-examined. Prosecutor is married. I do not answer as to having been in any trouble. "Were you in prison?" I am not bound to answer that. I have been married four years, the 22d of last August. I was working in a manufactory. I was living with my mother eleven months. I was working at Mr. Wilson's. I did not tell prisoner, if he told me I would not tell. I told him, perhaps *it would be better for him, if he would tell them how we had been robbed*, and put us on our guard. I do occasionally take the management of the shop. I manage the shop in my brother and husband's absence, and live in the house. I stand behind the counter and serve.

PARKE B. Is this admissible?

*Best.* An inducement by the prosecutor's wife renders a confession inadmissible only when it is held out in the presence of her husband. An inducement by the wife of a constable will not vitiate a confession.

PARKE B. The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority.

This confession was therefore likewise rejected. [I think inadmissible. MMS. PARKE B.]

Samuel Congdon. Prisoner was delivered to me on a charge; he said, there were others concerned as well as I. I did not speak to him before; this was on the 12th March.

There being no other evidence, a verdict of *Not Guilty* was returned.

if a constable, or a person of authority, holds out to a prisoner any circumstance of worldly advantage to himself as the consequence of making a confession, or of harm in not making it, a confession so made shall not be received in evidence.

LORD CAMPBELL C. J. "You need not say any thing to criminate yourself; but what you do say will be taken down, and used as evidence against you." Do these words import a promise or threat?

*Mills.* Sure these words may be construed into a threat.

LORD CAMPBELL C. J. Here there is no advantage held out to him, and there is no harm threatened if the prisoner holds his tongue. You do not bring the facts within your canon.

*Mills.* If you show a prisoner that you entertain a strong conviction of his guilt you disarm him, and what you say may induce him falsely to accuse himself. What is the inference that an accused person draws from your conduct, that if he does not confess the prosecution will be angry?

POLLOCK C. B. If the constable had said, it may or may not be used for or against you, then the caution would have been free from objection.

LORD CAMPBELL C. J. That is the form prescribed by the act of parliament to be employed by magistrates.

*Mills.* It amounts to this: You say to the prisoner, your case is so bad, that you cannot, if you speak the truth, deny it; in other words, if you speak the truth, you must confess. Therefore, according to the old cases, it is inadmissible. If it be a natural feeling that, when a man is accused of a crime, and he knows that suspicion rests upon him, and that he will not be believed if he directly denies his guilt, to make a statement by way of confession and avoidance, this case is within the rule.

LORD CAMPBELL C. J. "You need not say any thing to criminate yourself;" do you contend that these words, if you were to stop there, would operate as an inducement?

*Mills.* No; but the whole must be taken together.

PARKE B. What do you contend? Do the words amount to a promise of advantage, or to a threat?

*Mills.* That the words import an advantage.

PARKE B. What is the advantage?

*Mills.* "Whatever you say will be given in evidence."

POLLOCK C. B. No; not "*whatever you say*;" but "what you

do say." If the word "whatever" had been employed it might have been different.

*Mills.* I was under the impression that the constable had used the word "whatever," but it is not so. That word might have made the matter more pointed, but its omission does not make any material difference. The words amount to an absolute promise that the confession will be used in evidence, amongst the other evidence brought by the prosecution; they are not to be considered as a threat. In their proper signification, taken in their plain and literal sense, and construed in the only way in which they can be construed without reading them as a threat or as involving an absurdity, they hold out an assurance of advantage to the prisoner in regard to the charge, which renders the statement made on the strength of them inadmissible in evidence. They mean, what you say will be taken down and used as evidence against you, "as," that is to say, *in like manner as*, evidence against a prisoner; in other words, they will be used at the trial. It cannot be that the prisoner's statement would necessarily be something the effect of which would criminate him, and so be evidence against him; his statement might have been a detailed exoneration of himself. The words are certain in telling the prisoner that his statement would be used; and he is entitled not only by a favor due to him by law on the occasion, but also according to the rational interpretation of the words, to have "as evidence against him" construed to mean "*in like manner as*;" for otherwise the words, if not a threat, import an absurdity. The accused man sat with his face in his handkerchief, weeping, when the words were addressed to him; he had showed no intention of speaking; his situation was one to invite pity; and the words, "as evidence against," were prefaced with words of comfort. He was told, "you need not say any thing to criminate yourself." In effect, he was told, "speak, if you like, nor need you criminate yourself; what you like to say however shall be used at your trial; be warned therefore to say nothing against yourself." In *Regina v. Drew Carrington & Payne*, 140, the prisoner was told, "not to say any thing to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial." *Coleridge J.* held this to be an inducement, and that the prisoner's statement could not be received in evidence; nor is this to be considered as a hasty decision. In *Regina v. Morton*, 2 *Moody & Robin-*



son, 514, the prisoner was told by the constable who apprehended him, "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me, or anybody else, that may tend to injure you; but any thing that you can say in your defence we shall be ready to hear, or to send to assist you." Coleridge J. excluded this statement, which was made in consequence of this address. He said: "Upon reflection, I adhere to my decision in *Regina v. Drew*. If the latter words had stood alone, a confession obtained by them would be clearly inadmissible; they are likely to produce an improper effect on his mind. Before such evidence can be received, it must be seen that the prisoner's mind is free from any false hope or fear that would be likely to operate upon it, and induce him to state that which is not true. If any such influence has been used, both the hope and the fear must be removed by a proper caution, before the prisoner's statement can be received. In *Drew's Case*, the prisoner was told that what he said would be used for him. Is not that creating a hope that, if he told his story, whether true or false, it might benefit him? The caution that comes after does not take away the objection created by a promise in his favor; because it is impossible to say that the caution so modified the influence of the promise, as to leave his mind in an unprejudiced state to tell only the truth. Besides, the law will not sanction this sort of balancing the one influence with another; the prisoner's mind must be left entirely free. Approving of the decision quoted, I think this case comes altogether within the principle of it. The word "defence" necessarily conveying to the prisoner's mind that what he said would be for his benefit, the hope is created and remains. As to what has been said about the effect of this decision being to exclude every thing said before the magistrates, I altogether differ from it. It is the duty of a magistrate to give the prisoner the opportunity of saying what he chooses, whether for or against himself, provided no improper influence be used. But when a man interferes who has no such duty, and uses language tending improperly to influence the prisoner's mind, the statement cannot be received." This decision is perfectly rational, and warrants as in that case, so in this, that the caution given to the prisoner may be read as if the words "against you" had not occurred in it; if constables and others will inform prisoners of the consequences of making a statement, it is only just to require that they should do so correctly, and not

to hold out to them unfounded hopes of advantage from making statements. Another decision on this point is *Regina v. Furley*, 1 Cox C. C. 76. There the prisoner was told by a policeman, whatever she told him would be used against her on her trial. Maule J. decided this case on the authority of *Regina v. Drew*; holding, that to assure the prisoner that whatever she said would be used at her trial, was holding out to her an advantage which rendered her statement inadmissible. He said, where any caution at all is given, the proper course is to let the prisoner know what he says may do him harm, but cannot possibly do him good. His words also are: "If you promise a person that what he states will, at all events be used at the trial, you may be thereby inducing him to confess."

PARKE B. In consequence of the strong opinion entertained by Maule J. upon the question, I reserved a case at Aylesbury; but there the prisoner was acquitted.

LORD CAMPBELL C. J. It was in consequence of the decisions of my brother Coleridge and my brother Maule, and of a statement that my brother Parke had reserved the point, that I reserved this question.

*Mills.* The miserable advantage of having made a confession at any early stage, in the hope that he would derive some benefit or degree of mercy from having made it, may operate upon the mind of a prisoner; and you have no business to trap a man into a confession. There is another case decided by Maule J., *Regina v. Harris*, 1 Cox, 206, where the prisoner was cautioned, as in the case of *Regina v. Furley*, and where the confession was likewise excluded.

PARKE, B. On referring to my notes of *Regina v. Warringham*, I find that the words there used were, "It would be best for him if he would tell how it was transacted." The object of the report in *The Jurist* was to show, that where an inducement has been held out, it is incumbent on the prosecution to show affirmatively whether the inducement was made before or after the confession.

*Mills.* That undoubtedly was the object of the report, and your lordship's correction renders the case inapplicable to this argument. It was remarked by the Court in *Thompson's Case*, at the Old Bailey, 1783, 1 Leach C. C. at p. 293 (4th ed.), "Too great a chastity cannot be preserved on this subject," referring to the con-

fessions of prisoners; and Wilde C. J. in another case rejected evidence, because it had been obtained in answer to questions put to the prisoner.

LORD CAMPBELL C. J. Prisoners are not to be interrogated. By the law of Scotland, they may be; but by the law of England, they cannot.

*Mills.* In the case of *Rex v. Green*, 5 Carrington & Payne, 312, it was remarked by Gurney B. that it was proper to caution the prisoner that any confession he made would be admissible against him at the trial, and could do him no service; and in *Regina v. Arnold*, 8 Carrington & Payne, at p. 622, Lord Denman lays down the proper caution to be used by magistrates, which seemed framed to prevent prisoners from supposing that they shall necessarily have what they may say adduced at the trial. The object of 11 & 12 Vict. ch. 18, was to sanction the rule as laid down by Lord Denman; and it is to be noted that the statute uses the word "may" instead of "will."

*Power* and *Newton*, for the Crown, were not called on to address the court.

LORD CAMPBELL C. J. intimated, that as he had reserved the case for the consideration of the court, he should prefer hearing the judgment of the other Judges before expressing his opinion.

POLLOCK C. B. I am of opinion that the conviction is right; that the evidence was properly received. I consider that the grounds for not receiving such evidence are not those stated by the learned counsel in his elaborate and able argument, from a review of all the cases, that there is a presumption of law one way or other. The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false, or that the law considers such statement cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury. A simple caution to the accused to *tell the truth*, if he says any thing, has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put, that when a person is told to tell *the truth*, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say any thing; but

if he says any thing, let it be true. It has been decided, that that would not prevent the statement being received in evidence, by Littledale J. in the case of *Rex v. Court*, 7 Carrington & Payne, 486, and by Rolfe B. in a case at Gloucester, *Regina v. Holmes*, 1 Carrington & Kirwan, 248; but where the admonition to speak the truth has been coupled with any expression importing that it would *be better* for him to do so, it has been held that the confession was not receivable; the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Regina v. Garner*, 1 Denison C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not. With regard to the cases of *Regina v. Drew* and *Regina v. Morton*, with the greatest respect for my brother Coleridge, I do not approve of the decision in the former, or of the argument used to uphold it in the latter. I think the statement made by the prisoner in *Regina v. Drew* ought not to have been rejected. He was told, "that what he said would be taken down, and would be used for him or against him at the trial." The whole effect of the sentence was, that the man was told that whatever he said would be taken down and used as evidence in the cause; that is, the truth would be stated on the trial. I first heard of the opinion of my brother Maule in 1845, and I required it to be vouched, either by print or a manuscript note, that there had been such a decision. With every veneration for the opinions of my brother Maule, I cannot agree with his view on this subject; and I have myself decided the other way, offering to reserve a case for the consideration of the Judges. The question now is, whether the words employed by the constable, "*he need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him,*" amount either to a promise or a threat? We are not to torture this expression, or to say whether a man might have misunderstood their meaning; for the words of the statute might, by ingenuity, be suggested to raise in the mind of the prisoner very different ideas from that which is the natural meaning. The words are to be taken in their obvious meaning. It is very important for the protection of innocence that any man charged with a crime should be told, at the time of his apprehension, what that charge is. Attention should be paid to any communication made by him at that time, because,

generally, a prisoner has no means of paying for witnesses. The accused may frequently be in a situation at once to say that he was in such a place, and could prove an alibi, and may be able to make some statement of extreme importance, in order to show that he did not commit the crime, or was not the person intended to be charged. In criminal trials, I make a point of inquiring whether the prisoner made a statement on being first taken into custody; and I have known repeatedly an acquittal occur, chiefly on the grounds of what the prisoner stated at the time of his apprehension. It is proper that a prisoner should be cautioned not to criminate himself; but I think that what he says ought to be adduced, either as evidence of his guilt or as evidence in his favor. For these reasons, I think that the Lord Chief Justice properly received the confession at the trial.

PARKE B. I entirely agree with the Lord Chief Baron, and with the view taken by Lord Campbell at the trial. The prisoner was tried upon an indictment charging him with having administered poison to his wife, with intent to murder her. On the part of the prosecution, a police constable was called, whose evidence thus began: "I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with; he made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said, *he need not say any thing to criminate himself; what he did say would be taken down and used as evidence against him.*" Objection was made, on behalf of the prisoner, that what he then said was not admissible. His lordship thought that the words of the statute were merely a direction; and that although the caution of the constable differed from that directed by 11 & 12 Vict. ch. 42, § 18, to be given by the justice to the prisoner, in the word "will" instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could have no tendency to induce him to say any thing untrue; and that, in spite of it, if he did afterwards confess, the confession must be considered voluntary. In that I entirely concur, and I think that the reasons given by the Lord Chief Justice are satisfactory. By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement, in the nature of a promise or of a threat, held out by a person in authority, vitiates a confession. The

decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire; but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. 1 Taylor Ev. § 639. We all know how it occurred. Every judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were *res nova*, I cannot see how it could be argued that any advantage is offered to a prisoner by his being told that what he says will be used in evidence against him. I have the most unfeigned respect for Coleridge J. and Maule J.; and in deference to their decisions, I offered to reserve a case at Aylesbury, but I cannot concur in their judgment. I have reflected on *Regina v. Drew* and *Regina v. Morton*, and I have never been able to make out that any benefit was held out to the prisoner by the caution employed in those cases. We ought therefore to be extremely obliged to Lord Campbell for having reserved the point, in order that it might be settled.

ERLE J. I think that the statement of the prisoner was properly received. In my opinion, the best defence of innocence is founded on the statement which he is shown to have used when first accused; and I am of opinion that, when a confession is well proved, it is the best evidence that can be produced, and that unless it be clear that there was either a threat or a promise to induce it, it ought not to be excluded. I am much inclined to agree with Mr. Pitt Taylor; and according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of *guilt*. The words "*will*" or "*may*," as used in the caution, are, in effect, the same; one being absolute, the other contingent. In the able argument that has been addressed to us, it has been contended that the assurance that the statement *will* be used promises an advantage, and should therefore exclude the

confession; whilst it is admitted that this supposed advantage promised contingently does not exclude it. But if it be an advantage when promised positively, it is also a promise of advantage when made contingently; and if it does not exclude in one, neither ought it in the other.

WILLIAMS J. I am entirely of the same opinion. What was said to the prisoner was nothing more than what he said would not be kept secret, but would be used in evidence; and it is an over-refinement to say, that a statement made after such a caution was inadmissible.

LORD CAMPBELL C. J. I adhered to the opinion which I formed at the trial. The rule I take to be as Mr. Mills has stated it, that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that therefore it would be better not to submit it to the jury.<sup>1</sup> If the matter were *res integra*, I should perhaps have doubted whether it might not have been advisable to allow the confession to be given in evidence, and let the jury give what weight to it they pleased; but I do not in the slightest degree intend to break in upon the rule laid down by Mr. Mills. With regard to the decisions of my brother Coleridge and my brother Maule, with the greatest respect for them, I disagree with their conclusions. It was in deference to their ruling that I reserved this point, not that I entertained any doubt upon the question myself. I am very glad to find that all this court concur in the view which I took at the trial, that the evidence was admissible.

<sup>1</sup> But see Lord Campbell's dictum in *Regina v. Scott, Dearsly & Bell* C. C. at p. 58. He there says: "Because under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon."

REGINA v. MOORE.<sup>1</sup>

June 14, 1852.

*Confessions — Person in Authority.*

The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions.

THE prisoner was tried at the last Assizes for Sussex, before PARKE B. on the coroner's inquisition, for wilful murder of her new-born child. There was an indictment also against her for the same offence. She was found guilty of the misdemeanor of concealing the birth of her child.

There was offered in evidence against her a confession made by her in the presence of her mistress to a surgeon who attended her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found, with the thread round its neck. Her mistress had told her, before the surgeon came in, that "she had better speak the truth," and, in answer, she said she would tell it to the surgeon. An objection was taken, that any subsequent confession was inadmissible. After consulting Coleridge J. his lordship received the evidence, being of opinion that in this case, her husband not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth.

The prisoner was acquitted of the murder, because the jury believed that she was in such a state of mind that she did not know what she was about at the time.

The learned baron therefore requested the opinion of the Judges, whether the evidence was admissible.

On the 24th April 1852 this case was argued before POLLOCK C. B., PARKE B., ERLE J., WILLIAMS J. and CROMPTON J.

*Creasy*, for the prisoner. The question for the court is, whether the words "*she had better speak the truth*," spoken to the prisoner,

<sup>1</sup> 2 Denison C. C. 522. 5 Cox C. C. 555. 3 Carrington & Kirwan, 153.



a domestic servant, *by her mistress*, were such an inducement as to render the confession made by her inadmissible in evidence. In the case of *Regina v. Garner*, 1 Denison C. C. 329, where a girl, thirteen years of age, who was indicted for administering poison to her mistress, with intent to murder her, and the surgeon who attended the mistress said to the prisoner, in the presence of her mistress, that "it would be better for her to speak the truth," the confession was excluded; but it must be confessed that a distinction may be taken between that case and this.

ERLE J. *As a universal rule, an exhortation to tell the truth ought not to exclude a confession.*

*Creasy.* Nor is the present case like the case of *Rex v. Upchurch*, 1 Moody C. C. 465, because there the prisoner, a girl, had attempted to set fire to her master's house, and his wife, her mistress, who took part in the management of the house, said: "Mary, my girl, if you are guilty do confess; it will perhaps save your neck."

POLLOCK C. B. Nor is the present case like the case of *Regina v. Garner*, for there a domestic servant had attempted to murder her mistress, in whose presence the inducement was held out.

PARKE B. The question is, whether an inducement held out by the wife of a person not being the prosecutor, and the offence not being connected with the management of the house, is sufficient to exclude the confession?

*Creasy.* In *Rex v. Kingston*, 4 Carrington & Payne, 387, where on an indictment for administering arsenic, it appeared that the surgeon who was called in said to the prisoner, "You are under suspicion of this, and you had better tell all you know."

PARKE B. That has nothing to do with the present case.

*Creasy.* All the cases are collected in *Rex v. Gilham*, 1 Moody C. C. 186, where a confession made in consequence of the exhortation of a clergyman, was held to be admissible; and are also in *Joy on Confessions*. *Rex v. Rowe*, Russell & Ryan C. C. 153. *Regina v. Taylor*, 8 Carrington & Payne, 735. *Rex v. Simpson*, 1 Moody C. C. 410. In none of the cases where the inducement was held to exclude the confession, was the offence unconnected with the person or property or dwelling-house of the master and mistress, as in the present case; and the question is, can the court extend the rule respecting persons in authority to the master and

mistress of the person in whose house an offence of this nature has been committed? But it is submitted that the court is not so much to inquire whether the inducement was held out by the prosecutor, as whether the person who held it out was *likely* to be the prosecutor? In criminal cases, the Crown is the prosecutor, but the Crown is put in motion by private individuals; and a case occurred not very long ago where three persons were endeavoring to act the part of the prosecutor. The master and mistress of a house, in which such an outrage had been committed, were most likely to become the prosecutors. If the test, who was likely to be prosecutor be strictly applied, a married woman never would be bound over to prosecute. But who would be so likely to give information as the master and mistress? What party would be more likely, considering the nature of the offence, to interfere, than the mistress? Suppose the matter hushed up; if the master and mistress had been parties to the concealment of the offence, would they not have been guilty of misprision of felony? It is said that the offence has nothing to do with the management of the house. But who has so much authority over the mind of a maid-servant as her mistress? Is it not in the department of the wife to look after the morals of her female servants? We must not look at the case as lawyers, but consider what would be the natural result of an inducement by such a person. The test is not, it is submitted, who is the party to set justice in motion, but who is most likely to have influence? Who is it most natural that the prisoner should look to? The mistress, qua mistress, is also said to be a person in authority. It is said by Mr. Pitt Taylor, 1 Taylor Ev. § 631: "And first, as to the person by whom the inducement is offered. Here it is very clear, that if the promise or threat be made by any one having authority over the prisoner, as, for instance, by the prosecutor, the master or mistress of the prisoner, the constable, or other officer or person having him in custody, a magistrate, or the like, the confession will be rejected, as not being voluntary."<sup>1</sup> In 2 Russell on Crimes, 839,<sup>2</sup> it is observed: "With

<sup>1</sup> This passage in the fifth edition of Taylor on Evidence, I. § 797, is as follows: "Here it is very clear, that if the promise or threat be made by any one having authority over the prisoner in connection with the prosecution, as, for instance, by the prosecutor, the master or mistress of the prisoner, when the offence concerns such master or mistress, the constable, or other officer having him in custody, a magistrate, or the like, the confession will be rejected as not being voluntary."

<sup>2</sup> Vol. III. p. 387. 4th ed.

regard to the persons whose inducements will prevent the admission of confessions, it should seem that all who are engaged in the apprehension, prosecution, or examination of a prisoner, are considered as persons of such authority, that their inducements will exclude any confession thereby obtained. Thus, an inducement held out by the prosecutor, or the prosecutor's wife, or his attorney, or by a constable, or the prosecutor, in the apprehension or detention of the prisoner, or by a magistrate acting in the business, or other magistrate, or magistrate's clerk, or by a jailer or chaplain of a jail, or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, or by a master or mistress to a servant, or by a person having authority in the matter, or by a person in the presence of one in authority, with his assent, whether direct or implied, will be sufficient to exclude a confession made in consequence of such an inducement." *Rex v. Parratt*, 4 Carrington & Payne, 570.

PARKE B. Russell says, all who are *engaged in* the apprehension, prosecution, or examination of the prisoner.

*Creasy* referred to *Regina v. Taylor*, 8 Carrington & Payne, 733. Suppose an article stolen from an inmate in the house by a servant, would not the mistress have a presumable authority? The law, in various ways, recognizes the authority of a master and mistress over their servants, inflicting heavier punishments upon servants guilty of larceny from their master or mistress; and formerly, in making the murder of either of them petty treason.

No person appeared as counsel for the Crown.

*Cur. adv. vult.*

On the 14th June 1852 the following Judges being present, JERVIS C. J., PARKE B., ALDERSON B., MAULE J., CRESSWELL J., PLATT B., TALFOURD J., and MARTIN B., the following judgment was read by

PARKE B.<sup>1</sup> The cases on this subject have gone quite far enough, and ought not to be extended. It is admitted that confessions ought to be excluded unless voluntary, and the judge, not the jury, ought to determine whether they are so. One element in the consideration of this question, as to their being voluntary, is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when

<sup>1</sup> The editor is indebted to the kindness of Baron PARKE, for his lordship's MSS. of the above judgment.

it was determined that the judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of *all* the circumstances, including the nature of the threat or inducement, and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents, by which we are bound, and that is, that if the threat or inducement is held out actually or constructively, by a person *in authority*, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible.

The authorities are collected in Mr. Joy's very able Treatise on Confessions and Challenges, p. 23.

But in referring to the cases where the master or mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress, that their holding out the threat or promise renders the confession inadmissible. In *Rex v. Upchurch*, 1 Moody C. C. 465, the offence was arson of the dwelling-house, in the management of which the mistress *took a part*. *Regina v. Taylor*, 8 Carrington & Payne, 733, is to the like effect; so *Regina v. Hearne*, Carrington & Marshman, 109; *Regina v. Hewett*, Carrington & Marshman 534; so where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him, and the offence being a felony, and a felony actually committed, would have a power to do so, on reasonable suspicion that the prisoner was guilty. In *Regina v. Warringham*, ante p. 487, the confession was in consequence of what was said by a mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my note. In the present case, the offence of the prisoner, in killing her child, or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence; in practice, the prosecution is always the result of a coroner's inquest. Therefore, we are clearly of opinion that the confession was properly received.

*Conviction confirmed.*

THE QUEEN v. JOHNSTON.<sup>1</sup>

Easter Term 1864.

*Confessions — Elicited by Questions.*

M. J., suspected of having committed felony, was followed and stopped by a constable in plain clothes. The constable having told M. J. what he was, and that she (M. J.) was charged with felony, proceeded to put several questions to her, relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions, the constable had not told M. J. that she was under arrest, "but he would not have let her go." He did not expressly hold out any threat or inducement to M. J.; nor did he, before she answered him, give her any caution. M. J. having answered the questions, the constable then told her she was not bound to say any thing that would criminate herself; and said he should bring her to the police office.

*Held*, by eight Judges, that the conversation between M. J. and the constable was receivable in evidence; and, by three Judges, that it was not so receivable.

THE following case was reserved from the Commission Court for the county of Dublin, by the Hon. Justice O'Brien and the Hon. Justice Christian.

The prisoner was tried before us, on the 9th of December last, at the commission for the county of Dublin, for having feloniously stolen eight boots, the property of William Hutchings.

The first witness examined was Mr. W. Hutchings, who stated to the effect that he kept a boot and shoe and leather shop in Kingstown; that prisoner came into his shop on Saturday the 28th of November last, and asked to be fitted with a pair of boots, which was done. That at her request he allowed her to remain in the shop for some time; that, while she was there, he went out of the shop, and left his assistant P. Redmond there; and that when the witness returned to the shop, in about a quarter of an hour, the prisoner had gone; that she returned in about ten minutes afterwards, and said that the boots she selected were rather tight, and that she wished him to take her measure for another pair; that he did so, and asked for her address; that she gave her name as Miss Johnston; told him to send the pair of boots to Mr. Knight's shop in Kingstown, and that she left witness's shop

<sup>1</sup> 15 Irish Common Law Rep. 60. Court of Criminal Appeal. Coram LEFROY C. J., MONAHAN C. J., PIGOT C. B., BALL, KEOGH, O'BRIEN, and HAYES JJ., FITZGERALD and HUGHES BB., FITZGERALD J. and DEASY B.

in a couple of minutes afterwards. That on the next day, two detective policemen called on him, and brought him four odd boots, which were his. These boots were produced to witness at the trial, and appeared to be all for the right foot. Witness stated he had the fellows of them all, and produced them at the trial. He also stated that he had all the right boots in his shop on the morning of the 28th of November, and that he did not give them to the prisoner.

This witness was cross-examined as to the fact of the boots brought to him by the policeman being his ; and also as to whether they might not have been sold in the shop by his niece, who sometimes sold boots for him, or by his assistant, said P. Redmond, who were not examined.

The second witness was William Doyle, a policeman. He stated that, on Saturday the 28th of November last, he and another policeman (Inspector M'Dermot) followed the prisoner from Dublin to Kingstown, by railway ; that they followed her to several places in Kingstown, and saw her go on two occasions into Mr. Hutchings's shop. That then they followed her to the railway station at Kingstown, and went back to Dublin in the same train with her. That she had a small paper parcel and a bag in her hand when going into the train at Kingstown ; and that at Westland-row station she laid the parcel on the ticket office. That Inspector M'Dermott and witness (who were both in plain clothes) then went up to her. Witness stated what took place on their going up to her as follows : " I told her we belonged to the police, and that she was described to us as having stolen boots from shops in the city. I also said to her that she was charged as committing felony. I asked her what she had in the parcel. I would not have let her go ; but I did not tell her that I would not do so."

Witness was then asked by the Crown counsel " what did the prisoner say to you when you asked her what she had in the parcel ? "

Mr. Curran, prisoner's counsel, objected to that question : and the witness being further examined, then stated as follows : —

" I did not, before I asked her that question, or before the prisoner answered it, give her any caution, or hold out any inducement, and I have stated all that was said between us. I do not recollect Inspector M'Dermott saying any thing to her at all."

Witness then stated (subject to the objection of prisoner's coun-

sel): "Prisoner said she had two pair of boots in the parcel; and I then, before I said any thing else to her, took the parcel from her; and then I again asked her where she got them."

Prisoner's counsel then objected to the witness stating what the prisoner said in reply to the witness, and relied, amongst other things, on the decision of the present Lord Chief Baron, in the case of *Regina v. Bodkin*, 8 Irish Jurist N. S. 340. The evidence being pressed by the crown counsel, we stated that we would receive the objection, and that we would reserve the question of its admissibility for the consideration of the Court of Criminal Appeal. The witness then stated that, when he asked the prisoner where she got the boots, she said that "she was made a present of them in Kingstown;" and the witness also stated (subject to the like objection and reservation), the subsequent part of the conversation between him and the prisoner on that occasion, as follows: "I said to the prisoner that I saw her in Mr. Hutchings's shop in Kingstown; and I asked whether it was there she got them; she said yes; and that she took them out of that. I then told her, after she answered the foregoing questions, she was not bound to say any thing that would criminate herself; and I told her that we should arrest her, and bring her to the police office, which we did. I kept the boots" [witness identified them as those already produced to Mr. Hutchings].

The jury found the prisoner guilty. Another indictment had been found against her at the same commission, the trial of which was postponed till next commission. We did not sentence the prisoner; but decided she should be kept in custody, and postponed her sentence till the opinion of this court should be taken as to the admissibility of all the evidence objected to by prisoner's counsel, as above mentioned.

We therefore request the opinion of the court, whether the entire of the evidence objected to by the prisoner's counsel as aforesaid was legally and properly admissible. If any portion of said evidence was not legally and properly admissible, then the conviction is to be reversed.

J. CHRISTIAN.

10th January, 1864.

JAMES O'BRIEN.

*J. A. Curran* (with him *Molloy*) for the prisoner. The general rule of law on this point is to be found in *Regina v. Baldry*. There, Lord Campbell C. J. says: "Prisoners are not to be interro-

gated. By the law of Scotland they may be; but by the law of England they cannot" ante p. 494. Any examination of a prisoner is considered to be a privilege in his favor, and not an additional peril to him. 1 Chitty Crim. Law, p. 84. 1 Hayes Crim. Law, p. 254. Stephen Crim. Law, p. 190.

There are some authorities apparently on the other side, but which are all distinguishable. *Rex v. Thornton*, 1 Moody C. C. 27. There was no threat or promise in that case; and the point of that case has been differently decided since that date (1824). *Rex v. Wild*, 1 Moody C. C. 452. In that case the question was not asked by any person in authority. *The King v. Gibney*, Jebb. C. C. 15. In that case the evidence was admitted, because there was no threat of a temporal nature held out. There is a very strong expression of Doherty C. J. on this subject in *Regina v. Hughes*, 1 Crawford & Dix C. C. 13. In *Regina v. Doyle*, 1 Crawford & Dix C. C. 396, evidence of this kind was excluded. *Regina v. Devlin*, 2 Crawford & Dix C. C. 157, is to the same effect. *Regina v. Toole*, 7 Cox C. C. 244. *Regina v. Hassett*, 8 Cox C. C. 511. *Regina v. Bodkin*, 8 Irish Jurist, N. S. 340. [PIGOT C. B.: I think it right to state that, in that very case, I received evidence of a voluntary statement made by the prisoner to the policeman, previous to the question having been put to him by the policeman.] 1 Taylor Ev. § 798, and *Regina v. Pettit*, 4 Cox C. C. 164, were also cited.

*Beytagh* for the Crown (with him the *Solicitor General*, Sergeant *Sullivan*, and *C. R. Barry*).

The question is, whether the mere fact that the evidence consists of an answer to a question put by a policeman to a prisoner, renders the evidence inadmissible. I admit the prisoner was in custody at the time the question was put, although she was not aware of that fact. A material fact in the case is, that there was no threat used by the policeman, nor any inducement held out to her to confess. The fair inference from the evidence is, that there was neither caution, threat, nor inducement in the case.

I shall first refer to some passages in various text-books on the subject. They show, at all events, the general opinion of the profession on this point. Archbold Crim. Pl. p. 203 (ed. 1862). 1 Taylor Ev. § 804. 1 Hayes Crim. Law, p. 255. Joy on Confessions, pp. 34, 42. These passages show that, as a general rule, it is not sufficient, in order to exclude a statement made by a prisoner, to show that it has been elicited by a question put by a person in authority. I now come to the cases.



*Rex v. Gibney*, Jebb C. C. 15. This was the judgment of the Judges of Ireland forty-four years ago. I submit that it cannot be held to be overruled by decisions of single judges subsequently. [The Lord Chief Justice : The principle upon which that case was decided was, that the confession was a voluntary one. There was this foundation for their so holding, that the prisoner stated that his conscience would not let him conceal the crime any longer. *MONAHAN C. J.* : Yet they must have decided that the confession did not cease to be voluntary, from the fact of its having been elicited by a number of questions. A great number of questions were asked in that case, and some of them assumed the prisoner's guilt. No objection was taken on that head. The question as to the evidence being inadmissible, because it was elicited by questions put by a person in authority, was not argued.] The next case is one before Crampton J., *Regina v. Hughes*, Joy on Confessions, 39.

There are numerous cases in England on the point. *Rex v. Thornton*, 1 Moody C. C. 27. In that case the question assumed the guilt of the prisoner. [*MONAHAN C. J.* : The Judges must have assumed in that case that there were no threats or intimidation used, and that therefore the evidence was admissible.] *Rex v. Gilham*, 1 Moody C. C. 186 ; *Rex v. Wild*, 1 Moody C. C. 452 ; *Regina v. Kerr*, 8 Carrington & Payne, 176, are to the same effect. [*O'BRIEN J.* : In the last case, the evidence was not objected to. Prisoner's counsel, in his address to the jury, did complain of the way in which the evidence was obtained.] The last case on the subject is *Regina v. Cheverton*, 2 Foster & Finlason, 833. [*BALL J.* referred to the case of *Rex v. Ellis*, Ryan & Moody N. P. C. 432, before Littledale J., cited in Archbold Crim. Pl. p. 203.] The foundation of the conflict in the cases is *Regina v. Hughes*, 1 Crawford & Dix C. C. 13. In that case the main ground for rejecting the evidence was, that it was irrelevant ; and Doherty C. J. says : " This admission of the prisoner Patrick does not go to establish that he was aware of Margaret Maxwell's guilt at any time during the period she remained in his house ; and moreover it is an admission," &c.

In *Regina v. Doyle*, 1 Crawford & Dix C. C. 396, the question was put in a way calculated to entrap the prisoner. [*MONAHAN C. J.* : How do you distinguish the words of the question in Doyle's Case from those used in the present case ?] The question put, namely, " Was it there (in Hutchings's shop) you got them ? " was merely a continuation of what the prisoner herself had stated. *Regina v.*

Devlin, 2 Crawford & Dix C. C. 151, is founded entirely on the two cases I have cited. *Regina v. Toole*, 7 Cox C. C. 244, is not a decision on the abstract point.

Sergeant *Sullivan* on the same side. The text-books are nearly all in favor of the admissibility of the evidence. 1 Taylor Ev. § 804. The Crown is embarrassed by *Baldry's Case*. That case rules, according to Lord Campbell, ante p. 494, that you cannot interrogate a prisoner. [MONAHAN C. J.: That observation was probably in answer to a reference to *Regina v. Pettit*, 4 Cox C. C. 164.] It is not open to Lord Campbell to rule that there can be no interrogation of a prisoner. See *Regina v. Berriman*, 6 Cox C. C. 388. [The Lord Chief Justice: That refers to the case of a suspected person only, and has nothing to do with the case of a person under arrest. There had been no real arrest here. The constable had not told the prisoner that she was under arrest. The Lord Chief Baron: It may be a proper thing to make inquiries from a person suspected of a crime, in order to ascertain whether there are reasons for taking him into custody; but it is a different thing to put questions to him tending to prove his guilt, after he has been arrested.] I would suggest that, though the custom of interrogating prisoners may be liable to abuse, and though it has been condemned by various judges (who however have invariably admitted the evidence), yet that the rule of law is, that if there has been no threat or inducement by the interrogator, the evidence is admissible, although it has been elicited by interrogation. In *Baldry's Case* the words used were, that what the prisoner said "would be used against him at his trial;" and the court took the distinction that, if the words had been "may be used," it would have been right. In the present case, the words are not nearly so strong; and the question merely was, "What have you got in the parcel?" If the answer to this be admissible, the rest must be so. [The Lord Chief Justice: What occurs to me, on the principle of the case, is this: If a judge comes to decide that a confession is admissible in evidence, must he decide that it was a purely voluntary confession? The law of England, since the time of Judge Jeffreys, is against any kind of extraction of evidence from a prisoner, not only by torture, but by any thing that could be calculated to excite the prisoner to confess. Any answer given under such circumstances is not admissible. Now, what the legislature has done is this: By the statute 14 & 15 Vict. ch. 93, a

magistrate before whom a prisoner is brought is only at liberty to ask him one question, namely, "Whether he desires to say any thing?" and even this question is not to be asked without a previous caution being given to the prisoner; namely, that whatever he does say will be taken down in writing, and may be used against him at his trial. When the legislature has laid down this as the rule for us to steer by, when the Judges differ as to the circumstances to which they will apply the rule, ought not we to say that the law of England does not allow evidence to be obtained by questioning a prisoner, except in the particular way prescribed by the statute. O'BRIEN J. called attention to *Regina v. Berriman*, 6 Cox C. C. 388.] That case was decided solely on the particular facts of it. The question was an exceedingly improper one; namely, "Where did you put the body of your child?" [MONAHAN C. J.: Is not the meaning of the question in the present case "Did not you steal the shoes?"] In the case of *Rex v. Ellis, Ryan & Moody* N. P. C. 432, evidence of this kind was received. The answer was given to a question put by a magistrate to the prisoner, after he had refused the prisoner the assistance of an attorney. [The Lord Chief Baron: There appears to have been a new current of opinion setting in after the passing of the 14 & 15 Vict. The Lord Chief Justice: If we are put to choose between two rules of law, I think the legislature has given us the true rule.] The text-books are all in our favor.

*Molloy*, in reply. The interrogation of a prisoner, for the purpose of eliciting evidence to sustain the prosecution, is foreign to the spirit of our law "By the law of England," said Lord Campbell, in *Baldry's Case*, "prisoners cannot be interrogated." Sergeant Sullivan says that this is a mere interlocutory remark; but that is not so. It is the expression of Lord Campbell's well-considered opinion, indorsing a previous decision of Chief Justice Wilde, in *Regina v. Pettit*; where the latter refused to allow the prisoner's answer to the police constable's question to be given in evidence, and censured the practice of questioning prisoners. When *Baldry's* counsel, in his argument, referred to this, Lord Campbell interrupts him, to express his approval of Chief Justice Wilde's decision, saying, "Yes, by the law of England, prisoners cannot be interrogated." The examination of the prisoner, which it is the duty of every magistrate to take before committing a prisoner or sending a case for trial, is not the prosecutor's right; it is the

prisoner's privilege — a favor conferred by the law upon the prisoner, for his benefit, that, if innocent, he may, upon such examination, clear himself, and so regain his liberty. It is so laid down in 1 Chitty Crim. Law, p. 84. This examination was not allowed the prisoner at common law. It was first granted in cases of felony, by the 2 Philip and Mary, ch. 10 ; and afterwards extended to misdemeanors, by the 9 Geo. IV. ch. 54. The 14 & 15 Vict. ch. 93, regulates the mode in which this examination is to be taken, and prescribes the question which the justice is to ask the prisoner. It does not give him authority to ask any question he pleases. And accordingly, in *Berriman's Case*, when the magistrate did not rest satisfied with putting the question prescribed by the statute, but went further and asked another question the present Chief Justice of the Common Pleas in England would not allow the answer to be given in evidence, and said that the question should not have been asked. Is a constable to be permitted to do what a magistrate will not be suffered to do ? If the doctrine contended for by the Crown should be established, then a policeman will be empowered to do what, it must be admitted, neither a magistrate nor any of the Judges administering the criminal law have power to do. It is no part of a policeman's duty to examine prisoners. He should leave that, as the Chief Baron has observed in *Bodkin's Case*, to the magistrate, who alone has the power to reduce to writing what the prisoner says. It would be dangerous to admit evidence of this kind, depending, as it must, on the "slippery memory" of the constable, who may not be examined till months, or even years, after the transaction ; and then, through professional zeal, may unconsciously give a color and meaning to the prisoner's answers which in reality they do not bear. *Thornton's Case*, cited by the Crown, shows the evil results that will follow, and the length to which the police will proceed, if this class of evidence is admitted. Thornton was made to undergo a species of torture. He was a little boy of fourteen years old. The police officer arrested him, and, instead of taking him before the magistrates, who were then sitting, he sent him to the police office, kept him there for some time, took him then to the bridewell, kept him for nearly a day without food, cross-examined, abused, and intimidated the little boy, and by these means extorted an admission from him. This case, and the others cited by the Crown from *Moody*, and from *Jebb's Crown Cases*, are the authorities relied upon by the Crown. They were decided in the Court for Crown Cases Reserved before

the establishment of the Court of Criminal Appeal. In estimating how far the reports of these cases can be relied upon as authorities, it is important to consider the means which the reporters had of gaining reliable information as to the facts of the case, and the grounds of the decision which they report. In the Court of Criminal Appeal the facts are set forth in the case, transmitted to the court by the judge who tried the prisoner, the question is argued by counsel, and the Judges deliver their judgment in open court. It was not so in the old Court for Crown Cases Reserved. There the point reserved was considered privately, by the Judges, in the Queen's Bench Chamber; their decision was not given publicly in open court, but privately communicated to the next going judge of assize; so that the reporters had not the means of obtaining accurate information as to the facts of the case, or the grounds of the decision which they report. There must have been something more in these cases than appears in the reports; otherwise it is difficult to account for judges like Mr. Justice Burton and Chief Justice Bushe overruling, on circuit, decisions of the Twelve Judges, in which they themselves took part; especially as the opinion of the majority of the Judges upon reserved crown cases is binding upon the individual Judges, whatever their own opinion may be. Jebb's Reserved Cases, p. 234. Chief Justice Bushe and Justice Burton were two of the Judges by whom Gibney's Case was decided, yet the former, in *Regina v. Doyle*, and the latter, in *Regina v. Devlin*, refused to allow the prisoner's answers to a policeman's questions to be given in evidence. Furthermore, the cases upon which the Crown relies do not appear to have been followed either in England or in this country. That they were not followed in England, is evident from the remarks of Chief Justice Doherty in *Regina v. Hughes*, and the decisions in *Pettit's Case* and *Berriman's Case*; that they were not followed in Ireland, is shown by the several decisions of the eminent Judges referred to by Mr. Curran. Gibney's Case was not reported till nineteen years after the decision, and the report is not taken from the notes made by Justice Jebb. Wild's Case and Gilham's Case are not analogous to the present one. In those cases the questions were not asked by the constable. *Regina v. Cheverton*, the most recent case, is not an authority for the Crown, but rather one for the prisoner. There, Chief Justice Erle rejected admissions elicited from the prisoner by the constable's questions, and stigmatized the practice of questioning prisoners as most improper; and from the note

in 2 Foster & Finlason, it appears that Cockburn C. J. expressed a similar opinion during the same circuit. *Cur. adv. vult.*

DEASY B. In this case the prisoner was convicted of feloniously stealing boots, at the last commission, before Judges O'Brien and Christian. In the course of the trial, certain statements of the prisoner were tendered and received in evidence against her, though objected to by her counsel. The circumstances are thus stated in the report of the learned Judges who tried the case:—

A police constable, W. Doyle, stated that he and a police inspector, both in plain clothes, followed the prisoner from Kingstown to Dublin, and that at Westland-row station they went up to her, and he, Doyle, told her they belonged to the police, and that she was described as having stolen boots from shops in the city. He also said to her that she was charged as having committed a felony. He asked her, what she had in that parcel. He would not, he said, have let her go, but he did not tell her that. He said he did not, before he asked that question, or before she answered it, give her any caution, or hold out any inducement, and that he told all that was said between him and the prisoner; and that he did not recollect that the inspector said any thing. The prisoner's counsel having objected to the admissibility of the answers given by the prisoner to the questions put by Doyle under the foregoing circumstances, the Judges received them, but reserved for this court the question of the propriety of their reception.

It was contended on the part of the prisoner that, as the statements were made in answer to questions put by a police constable, when she was in effect in custody, without any previous caution, they should not have been received in evidence against her; and they have referred us to observations of several very eminent judges strongly disapproving of evidence of that description. However I may concur in those observations, I have been unable to satisfy myself that there was any legal objection to its admission. The rule of law is, that admissions made by a person accused of a criminal offence are to be received in evidence against him at the trial, provided they appear to be purely voluntary; but if they appear to be produced by the influence of any threat or inducement of a temporal nature, used by a person having authority, they cannot be received, because the court cannot be satisfied that they are

not the result of such threat or inducement, and therefore not purely voluntary.

In *Lamb's Case*, 2 Leach C. C. 154, the rule is thus stated by Grose J., giving the opinion of the twelve Judges: "The general rule respecting this species of testimony is, that a free and voluntary confession, made by a person accused of an offence, is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting him to the magistrate, or even after he has entered the house of the magistrate for the purpose of undergoing his examination."

In *Baldry's Case*, 2 Denison C. C. 446, it is thus stated by Lord Campbell C. J.: "The rule I take it to be as Mr. Mills has stated, and that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the statement under a bias; and that therefore it would be better not to submit it to the jury. If the matter were *res integra*, I should perhaps have doubted whether it might not have been advisable to allow the confession to be given in evidence, and let the jury give what weight to it they pleased; but I do not, in the slightest degree, intend to break in upon the rule laid down by Mr. Mills."

That the rule thus laid down does not operate to exclude statements made by accused persons, in answer to questions put to them, whether by persons in authority or by others, though not preceded by any caution, has been repeatedly decided; and unless those decisions are now to be overruled, we cannot yield to the objection made to the admission of the statements of the prisoner in the present case. Thus in *Gibney's Case*, which is reported in *Jebb's Reserved Cases*, p. 15, the prisoner was taken into custody upon a charge of having murdered his child. The constable who was taking him to jail said he held out no hopes to the prisoner nor used any threat. He said to him: "You must be a very unhappy boy to have murdered your own child, if it be the case." The prisoner was crying very severely, and the constable then said: "Did you kill the child?" in answer to which the prisoner made a full confession. The admissibility of this, and of another confession to another constable being considered, all the Judges being present, it was their unanimous opinion that the confession was

properly received. "Some of the Judges," Mr. Jebb says, "had doubts, but they finally concurred with the rest. They held the rule to be well established, that a voluntary confession shall be received in evidence; but if hope has been excited, or threats or intimidation held out, it shall not. The fear however to be produced must be of a temporal nature; and in this case there was no such threat or intimidation, nor any fear of a temporal nature produced."

In Thornton's Case, 1 Moody C. C. 27, a similar decision was come to by the majority of the English Judges. There, while the prisoner, a boy of fourteen, was in custody upon a charge of arson, the police officer told him that, in consequence of the falsehoods he had told and the prevarications he had used, there was no doubt he had set the premises on fire, and asked him if any persons had been concerned with him or induced him to do it. The prisoner said he had not done it. The police officer replied that he would not have told so many falsehoods as he had, if he had not been concerned in it, and again asked him if anybody had induced him to do it. The prisoner began to cry, and made a full confession. The judge, Bayley J. thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and where the conduct of the police officer was calculated to intimidate, was admissible in evidence; and reserved the point for the consideration of the Judges. The report states that in Trinity term 1824 the Judges met and considered the case, and seven Judges, among whom was Lord Tenderden, held the confession rightly receivable, on the ground that no threat or promise had been used. Three Judges, Best C. J., Bayley J. and Holroyd J. were of a contrary opinion.

In *The King v. Wild*, 1 Moody C. C. 452, the prisoner, a boy under fourteen, was tried and convicted of murder before Gaselee J. Part of the evidence against him was a statement made by him to a man who made him kneel down. The witness stated: "He did kneel down. I then said to him: 'I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty.' I then said: 'Did these children fall into the pit?'" The question of the admissibility of the prisoner's statement in answer to that question having been reserved, it was considered at a meeting at which all the Judges but four were present, in Michaelmas term 1835; and they were unani-



mous that the confession was strictly admissible ; but they much disapproved of the mode in which it was obtained. There, the statement was made to a person not a constable ; but the prisoner was in custody upon the charge of which he was afterwards convicted.

In *Gilham's Case*, 1 Moody C. C. 186, the prisoner was tried and convicted before Littledale J., of murder, principally upon confessions made by him in jail, which he was induced to make by the exhortations of the chaplain of the jail ; and among those confessions was one in answer to a question put to him by one of the mayor's officers. The question as to the admissibility of those confessions having been reserved, it was argued in Trinity term 1828, in the presence of all the Judges, except Hullock B. The Judges present were unanimously of opinion that the confessions were properly received ; and the prisoner was afterwards executed. It is said that these cases are not binding on us, as the Judges did not sit as a court, and as two of them, viz. *Gibney's Case* and *Thornton's Case*, were come to without argument ; but, though not binding upon us, they are authorities of the greatest weight, and ought now to be followed by us, unless counteracted by subsequent decisions of equal, or nearly equal, importance. But, so far from there being any such subsequent decisions, I find that admissions made in answers to questions put by constables have been repeatedly admitted in evidence against prisoners in England. Thus in *The Queen v. Berriman*, 6 Cox C. C. 388, where the prisoner was indicted for concealing the birth of her child, it appeared that, in consequence of rumors affecting her character, a police officer went to her, and charged her with having murdered or concealed the birth of her child. The result of his questions was, the report says, that she made a certain statement, which he declared in evidence to the jury. Erle J. expressed the strongest disapprobation of the course pursued ; but he admitted the evidence. He says : " If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories, with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be sparingly resorted to. But here, there was nothing whatever to show that any crime had been committed. No finding of any body, — no sign of delivery, — no marks of blood, — not the slightest indication in fact to point to crime ; and it is

sought, by questioning the prisoner on the subject, to establish from her own lips the crime itself, as well as her guilty connection with it." — "I wish it," he says, "to go forth among the inferior officers of justice, that such a practice is entirely opposed to the spirit of our law." Those strong expressions of condemnation of the course pursued to obtain the evidence show conclusively that the eminent judge who used them did not consider that there was any ground upon which he would have been justified in rejecting the evidence obtained by it.

Again in the case of *The Queen v. Cheverton*, 2 Foster & Finlason, 833, tried before the same judge, admissions obtained by questions put by a policeman were admitted in evidence against the prisoner. There, the prisoner was tried for the murder of her infant child. A policeman named Boxler had said to the prisoner: "You had better tell all about it; it will save trouble;" and had then put questions to her, the answers to which it was proposed to give in evidence. The counsel objected to the evidence as inadmissible, as having been made under the influence of a threat or inducement by a person in authority. Erle C. J. so held; and the evidence therefore was rejected. A police superintendent had afterwards gone to the prisoner, and, without cautioning her, or explaining the object of his inquiries to her, put questions to her, the answers to which it was proposed to give in evidence. The questions were as to the number of her children, and in particular what had become of the youngest, the one mentioned in the indictment, and whether she had been at Colchester on the 4th of July, the place and time of the murder charged in the indictment. The counsel objected that the statements were inadmissible, because made by the prisoner under the influence of the same inducement, it being all part of the same proceedings on the part of the police. Erle C. J. consulted Wightman J., and intimated that his learned brother and himself were of opinion that, though this former statement was inadmissible, there did not appear the same reason for excluding the second. He would however reserve the point if requested. The evidence was admitted; but the prisoner was acquitted. The reporter states in a note to that case, that the chief justice in charging the grand jury, had observed upon the practice as very improper; and that Cockburn C. J. during the same assizes on the Midland circuit, expressed a similar censure in a similar case. Now, what constituted the impropriety is the

giving in evidence against the prisoner admissions so obtained ; so that both those eminent judges must have been of opinion that the mode of obtaining the admissions did not of itself constitute a ground for refusing to receive them in evidence against the person who made them.

The case of *The Queen v. Baldry* is also a strong authority for the admission of such evidence as that here objected to. There, the prisoner was indicted for administering poison, with intent to murder, and tried before Lord Campbell. A policeman was called for the prosecution, who said : " I went to the prisoner on the 17th of December ; I saw the prisoner ; Dr. V—— and another constable were with me. I told him what he was charged with ; he made no reply, and sat with his face buried in his handkerchief ; I believe he was crying ; I said he need not say any thing to criminate himself ; what he did say would be used as evidence against him." Objection was made on behalf of the prisoner, that what he then said was inadmissible. Lord Campbell received the statement of the prisoner, which amounted to an admission of his guilt. But, as doubts had been entertained whether a confession, after such a caution, might lawfully be given in evidence, he reserved the question for the Court of Criminal Appeal ; the prisoner was convicted, and sentenced to death. The case was argued in April 1852 before Lord Campbell C. J., Pollock C. B., Parke B., Erle J. and Williams J. The argument of the prisoner's counsel was entirely based upon the words of caution used by the policeman, which he contended amounted to an inducement ; but the court were unanimously of opinion that there was no foundation for the argument, and the confession had been properly received ; and the rule was laid down by all the Judges, especially by Erle J. and Lord Campbell C. J. that, in the absence of threat or inducement, any statement made by an accused person may be received in evidence against him.

In *The Queen v. Kerr*, 8 Carrington & Payne, 179, the prisoner was indicted for stealing four £5 notes. A policeman who examined her box, and found two £5 notes in it, asked her where were the other two ; and she said she did not take more than two. On his cross-examination, he said he did not caution her that her answer would be given in evidence against her. The evidence was commented on strongly by the prisoner's counsel ; but it was received by Park J. and the prisoner was convicted.

It is said that it is unreasonable to allow the constable to interrogate the prisoner, while the magistrate, before whom it is the duty of the constable to bring him, is precluded from doing so; and reliance has been placed upon the 14th section of the 14 & 15 Vict. ch. 93, which regulates the manner in which evidence shall be taken in proceedings before magistrates for indictable offences. But that section mainly enables depositions of witnesses, and the written statement of the prisoner, when taken in conformity with its provisions, to be used; and does not otherwise alter the law of England; and it contains the following proviso: "Nothing herein contained shall prevent the prosecutor from giving in evidence any admission or confession or other statement made at any time by the person arrested, and which would be admissible by law as evidence against such persons." I do not see therefore how that act can affect the admissibility of statements or admissions of the accused made to a policeman, any more than it can affect those made to any other person. Even where there was no such proviso, it was held in *Lamb's Case*, 2 Leach C. C. 154, that the analogous act of Philip and Mary did not prevent that being received in evidence against a prisoner which was receivable in evidence before.

If the objection that the statement of the accused was made in answer to questions put by policemen were to prevail, that objection would apply still more strongly to answers made to questions put by a magistrate, since his authority, and consequently his influence over the accused, considerably exceeds that of the policeman, yet it has been held, more than once, that answers to questions so put are admissible against the prisoner.

In *Rex v. Ellis, Ryan & Moody* N. P. C. 432, the examination of the prisoner, taken before the committing magistrate, was offered in evidence. It appeared that part of the evidence was elicited by questions put by the magistrate, the prisoner having claimed the right of his attorney's attendance and assistance, which the magistrate refused to permit. No threat or promise was used by the magistrate. It was objected by Wilde J. on the authority of *Rex v. Wilson*, Holt N. P. C. 597, that an examination so obtained is inadmissible against the prisoner. Littledale J.: "It is stated, in *Starkie's Evidence*, Appendix, part iv. 52, where the case quoted is also noticed, that Holroyd J. received an examination to which there was this objection. I think his decision a correct one, and

that the evidence is upon principle admissible." Again in *Rex v. Court*, 7 Carrington & Payne, 486, it was proposed to give in evidence the examination of the prisoner before the committing magistrate. The magistrate said: "No inducement was held out to the prisoner to confess. Mr. N—— had said, in the presence of the prisoner, that he considered the prisoner to be the tool of G——. I then told the prisoner to be sure to tell the truth. He then made the statement." It was objected to by the prisoner's counsel; but Littledale J. received it, saying: "The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he never really committed."

In *The Queen v. Rees*, 7 Carrington & Payne, 569, part of the prisoner's statement was made in answer to questions put to him by the magistrate. It was afterwards read to him, and he said it was correct; and Denman C. J. received it in evidence. In *The Queen v. Bartlett*, 7 Carrington & Payne, 832, on an indictment for murder, the examination of the prisoner before the magistrate was objected to, on the ground that it appeared as if some parts of it were in answer to questions put by the magistrate; but Bolland B. said it could not be rejected on that ground, and the prisoner was found guilty. It is true that in the case of *The Queen v. Pettit*, 4 Cox C. C. 164, Wilde C. J. refused to receive answers to questions put by a magistrate; and in *The Queen v. Berriman*, 6 Cox C. C. 388, Erle J. made a similar ruling. But in *The Queen v. Stripp*, Dearsly C. C. 648, it was held by the Court of Criminal Appeal that a voluntary statement of a prisoner, made in the presence of the magistrate, though not committed to writing pursuant to section 18 of the 11 & 12 Vict. ch. 42, which corresponds with section 14 of the Irish Act, was admissible against the prisoner.

Unless therefore a distinction is to be made between a statement made in answer to a question put by a magistrate, and a statement made to him not in answer to a question, as to which I give no opinion, the rulings of Wilde C. J. and Erle J. must be considered as overruled by the decisions of the Court of Criminal Appeal in *Stripp's Case*. But even if they are to be considered correct, they do not in any manner conflict with the previous cases

in which it was held that statements made in answer to questions put by policemen, if not made under the influence of fear or hope, are admissible in evidence against the person who made them.

The only two cases which are opposed to this view are those of *The Queen v. Margaret Hughes*, 1 Crawford & Dix C. C. 115, before Doherty C. J. and *The Queen v. Devlin*, 2 Crawford & Dix C. C. 152, before Burton J. who is said to have consulted Brady C. B. But in neither of these were the previous cases referred to, nor are any reasons given; when they were brought under the notice of Crampton J. in the case of *The Queen v. Francis Hughes, Joy*, 39, he said: "He had frequently had occasion to decide the question, and all these cases had been before him. The confession of a man, to be admitted, is not to be extorted by fear nor induced by flattery; but when a person voluntarily gives it, it may be received, whether the questions be put to him by an authorized or unauthorized person; wherever the declaration is voluntary he would receive it; and that the doctrine in Wild's Case was the true one."

In the case of *The Queen v. Toole*, 7 Cox, 244, relied on by the prisoner's counsel, it is true that such evidence was rejected by Pigot C. B. and Richards B.; but the reasons given for its rejection are perfectly consistent with the rule as laid down in the cases to which I have referred. Pigot C. B. says: "I do not think the abstract question is now before us, or that we are called on to decide it. The view I take of the present point for our decision is this; it is essential that the judge should be satisfied that the statement of the prisoner has not been the result of some influence acting upon the mind, either of hope or fear. I am not satisfied upon that point, and therefore I reject the evidence." And Richards B. says: "The rule is that, if there has been any motive of fear or hope acting on the prisoner, the statement consequent on this statement should not be admitted. Without laying down any abstract rule, it is sufficient to say we do not think this evidence should be admitted." That case therefore is not an authority for the general proposition submitted to us, that any statement made by an accused person, in answer to questions put by a constable, is, upon that ground alone, to be rejected. The fact that the statement was elicited by questions so put, may be an element in leading to the conclusion that it was made under the influence of fear or hope, excited by a person in authority, but we could not decide that it was *per se* sufficient to cause the rejection

of the statement, without overruling the numerous cases in which such statements have been received in evidence against prisoners both in England and Ireland.

FITZGERALD J., HUGHES B. and FITZGERALD B. concurred with Baron DEASY.

HAYES J. On the afternoon of the 28th of November last, two police constables, in colored or plain clothes, travelled by the train from Kingstown to Dublin. On their arrival at Westland-row, a young woman (the defendant Mary Johnston) also got out of the train, having a small paper parcel in her hand; and between her and one of the policemen (William Doyle), in the presence of the other, the following conversation occurred:—

Police Constable. "We belong to the police. You have been described to us as having stolen boots from shops in the city. You are charged with having committed felony. What have you in the parcel?"

Mary Johnston. "I have two pairs of boots in the parcel."

Police Constable (taking the parcel from her). "Where did you get them?"

Mary Johnston. "I was made a present of them in Kingstown."

Police Constable. "I saw you in Mr. Hutchings's shop in Kingstown. Was it there you got them?"

Mary Johnston. "Yes. I took them out of that."

Police Constable. "You are not bound to say any thing to criminate yourself. We shall arrest you, and bring you to the police office."

The question now for our consideration is, whether the last answer given by the defendant, in which she said she had got the boots in Mr. Hutchings's shop, was legally receivable in evidence.

The case has been argued on both sides as of a confession made by one while in the custody of a constable, and in answer to interrogatories addressed to her by him; which, I may say, I by no means think a correct mode of dealing with the case. As the law now stands, confessions, made in the course of criminal proceedings, may be considered under three aspects, according to the stage at which they are made:—

*First.* The confession may be made in open court, when the party is called on to plead to the indictment. In all such cases it is usual for the judge, in mercy to the prisoner, and before directing the plea of guilty to be entered, to examine him, in order to

satisfy himself whether the confession is freely and voluntarily made. But, whether he do so or not, I believe it has never been questioned but that the confession, so made and entered of record, does import such absolute verity that it is allowed by the law to stand in place of a conviction by the jury, and to warrant the court in pronouncing judgment upon it accordingly.

*Second.* A confession may be made before the committing magistrate, after he has taken the evidence against the prisoner, and in obedience to the statute 14 & 15 Vict. ch. 93 § 14, par. 2; and this we may call a magisterial confession, as the other may be distinguished as a confession of record. That clause of the statute is a virtual re-enactment of the 12 & 13 Vict. ch. 69 § 18 (11 & 12 Vict. ch. 42 § 18, Eng.), which was a substitution, with great amendments, for that portion of the 9 Geo. IV. ch. 54 §§ 2, 3 (7 Geo. IV. ch. 64 §§ 2, 3, Eng.) that relates to the examination of accused persons; and which last-mentioned act was itself a substitution for the 10 Car. I. sess. 2, ch. 18 §§ 1, 3 (Ir.); analogous to the English enactments, 1 & 2 Philip and Mary, ch. 13 § 4, and 2 & 3 Philip and Mary, ch. 10.

These earlier statutes of Mary and of Charles, as well as the statutes of Geo. IV. simply direct that the magistrate, before admitting to bail, or committing any person charged with felony, shall take the examination of the prisoner, and the information of them that bring him, of the facts and circumstances thereof; and the same, or so much thereof as shall be material to prove the felony, shall be put in writing, before they make the bailment; or, in case of committal, within two days after the examination; and the same shall certify at the next general jail delivery.

It is unnecessary for us now to discuss what was the real object and intention of the legislature in these enactments: I mean, so much as authorizes and directs the magistrate to take the examination of the prisoner. Suffice it to say that, in the enactment now in force, the legislature has spoken its purpose with clearness and precision. The 14 & 15 Vict. ch. 93 § 14, in substance enacts that, when the examination of the witnesses for the prosecution shall have been completed in the presence of the prisoner, thus giving him a full opportunity for cross-examination, and of knowing the precise case made against him, he is then, after a due caution from the magistrate, to be asked whether he has any statement to make; and that, if so, it will be taken down in writing, and may



be given in evidence against him on his trial. This caution is so essential a part of the proceeding, that, if it be omitted, no matter how carefully the magistrate may in other respects have conducted himself, the confession cannot be received against the prisoner as evidence under the statute.

As introductory to the third species of confession, it is necessary to call attention to a proviso in the enactment I have last referred to, to the effect that nothing therein contained shall prevent the prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused, and which would be admissible by law as evidence against such person. This third species of confession, which, as no better name occurs to me, I may distinguish as a confession *in pais*, is not regulated by any statutory enactments, but is governed wholly by the principles of common law, as enunciated in the maxim "*nemo tenetur prodere seipsum*," and by judicial decision in elucidation of that maxim. It may be made as well after arrest as before it; and indeed at any time after the commission of the offence, until the accused has been brought up for trial. There is no statute, or any principle of the common law, which requires that, to give effect to such a confession, it ought to be preceded by a caution. It is only in the case of a magisterial confession that a caution is, by statute law, made essential. All that the common law requires is that the confession *in pais* be voluntary. But that word is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by any unfair, dishonest, or fraudulent practices, to induce a confession.

Upon this principle it is that, in the tenderness of modern times, judges have uniformly refused to receive in evidence a confession that has been either certainly or probably procured by a promise of good or a threat of evil; by exciting a hope of reward or a fear of temporal punishment other than that which the law has prescribed for the offence charged. So also a confession will be rejected if it appear to have been extracted by the presumed pressure and obligation of an oath, or by pestering interrogatories, or if it have been made by the party to rid himself of importunity, or if, by subtle and ensnaring questions, as those which are framed so as to conceal their drift and object, he has been taken at a disadvan-

tage, and thus entrapped into a statement which, if left to himself, and in the full freedom of volition, he would not have made. These are cited merely as instances of the several ways in which a confession may be unfairly and improperly procured, so as to deprive it of the character of being voluntary; but I am not aware of any law which declares, as an abstract proposition, that a confession is undeserving of that character if it has been made in answer to questions fairly put, while the party has been left at full liberty to answer or not, as he may think right.

These principles, as I have said, will apply to the confession in pais, whether it has been made by a person at liberty or under arrest; but it is manifest to every one's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears. It is for the purpose of counteracting these influences, and, as much as possible, preserving the mental freedom of the accused, though his bodily liberty may have been restrained, that the criminal jurisdiction has devised and instituted the practice of requiring constables and other persons having the custody of prisoners, so far as possible, to preface with a caution every communication between them which tends to a confession. But I apprehend that these proceedings are desired to be had recourse to *ex majori cautela*, and the better to insure a voluntary confession, but not as in all cases essential to it. Whether a confession be or be not voluntary, is a question altogether for the judge to decide, when all the circumstances have been laid before him in evidence; and if he, in the sound exercise of his understanding, be well satisfied that it is the voluntary and unbiased effusion of the mind of the criminal, though it may not have been preceded by a caution, and though it may have been elicited by questions, he will be bound to receive it in evidence; as otherwise he would be unwarrantably contracting, if not wholly stopping up, one of the avenues of justice. On the other hand, if he be not so satisfied, the evidence ought to be excluded. All the decisions on this question I regard as pronouncements of judiciary law, for the better guidance of the discretion of the judge, and for ascertaining some fixed and settled rule by which the administration of criminal justice may be established on principles fixed as well as pure. How then, or where, can we draw any other

line than that which is marked out by an arrest, or other demonstration that the party has been made amenable to criminal justice?

Until the criminal feels himself amenable to justice he ought, I think, to be dealt with as one at full liberty to act and speak as he may think right, whosoever be the person with whom he may come in contact. The rules of evidence, in criminal, as in civil cases, clearly establish that every thing which a person freely says or does may be made evidence against him on all relevant occasions. Bacon Ab. Evidence, L. It matters nothing whether the statement be made to an associate or to a stranger, or to an officer of the law, whose duty may have urged him diligently to make, and even press, inquiries suggested by suspicious facts and circumstances. It would seem to be an exhibition of morbid sensibility towards criminals, if we were to hold that the falsehoods and equivocations uttered by a person not in custody, but strongly suspected of crime, to a constable interrogating him on the grounds of his suspicion, and all uttered for the deliberate purpose of baffling suspicion and evading detection, but nevertheless tending, with subsequent discoveries, to show not only that he was a thief, but a thorough adept in the practice, were to be a sealed book for the purposes of evidence against him, unless the constable were, by a formal caution given, to instruct the party as to the full extent of his (the constable's) suspicions, and so frustrate all the good effects to be expected from interrogation.

In laying down the rule as I have done, I am not aware that I am violating the principle of any single decision, save the case of *Regina v. Berriman*, of which I shall speak presently; and as I recollect, all the cases that have been cited to us of confessions rejected because not preceded by a caution, are those in which the party was not only a prisoner, but felt himself to be so.

In the case before us, we are informed that the constable had made up his mind that the young woman should not leave him; he was resolved to make her his prisoner, but he had not done so; and we have no reason to think that she ever for a moment, during the conversation given in evidence, felt herself to be so. But what matters it whether the constable had or had not made up his mind as to his future course of proceeding, if he kept it to himself, and so did not injuriously affect the mind of the accused?

I have referred to *Regina v. Berriman*, 6 Cox C. C. 389. There,

Mr. Justice Erle, in his address to the jury, lays down the law thus : " No police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person, for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories, with a view to ascertain whether there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to."

Now, after the best consideration I am able to give to the case cited, I am by no means prepared to accept it as a sound exposition of law. It would lead I think to results very injurious to society, and I think it hardly consistent with the case of *Beckwith v. Philby*, 6 Barnewall & Cresswell, 636. It would seem strange that the constable, acting in discharge of a duty imposed on him by law, should have full power to arrest a person reasonably suspected of crime, though no crime was committed ; but would have no right to question the suspected party, though not a prisoner, as to the grounds of suspicion, until he had first satisfied himself that the crime suspected had been really committed.

On the whole of the case now before us, I am of opinion that the statement to the constable — having been made at a time when the party neither was a prisoner, nor felt or supposed herself to be a prisoner, and not appearing to have been obtained by any threat, promise, or other undue or unfair means — was properly receivable in evidence. But, on the other hand, I am of opinion that if the defendant had, at the time of that conversation, felt herself to be in custody on the criminal charge, then her statements, in answer to the questions, would not have been receivable, unless prefaced by a caution. The announcement of the interrogator's character, and of the charge of felony that he said had been made against the defendant, followed up by a series of questions, in which he exhibited an incredulity as to the truth of the statements made by the defendant, when tested by the facts which he showed her were within *his* knowledge as well as *hers*. All this would, I think, have been quite sufficient to make the defendant feel that she was not at full liberty to speak, or refrain from speaking ; but that she was bound in some way or other to explain or account for the contrariety between her statement, — that she had been made a present of the boots, — and the constable's statement, in answer, that

he had seen her that day in Mr. Hutchings's shop ; thus plainly insinuating that the boots had been taken from that shop ; and so lead the judge, on the trial, to the conclusion that the prisoner's statement was not voluntary.

O'BRIEN J. In this case, which was tried before my brother Christian and myself, at the last December commission for the county of Dublin, I am of opinion that the conviction should be reversed, on the ground that certain answers of the prisoner to questions put to her by a policeman (and which answers we received in evidence, subject to the opinion of this court) were not legally admissible. The first point for consideration is whether, when the questions were put, the prisoner was not substantially in custody. It appears to me that, although the crime with which the policeman charged her (that of stealing boots in the city) was not that for which she was tried (namely, stealing boots in Kingstown) yet that, from the course adopted by the policeman, she must have considered herself as being in custody on one charge or the other ; and that, accordingly, the question of the admissibility of the evidence is to be dealt with on the same grounds as if she had been actually arrested on the present charge.

The next question is one which frequently arises, and is of considerable importance, namely, whether, if questions be put to a prisoner by the constable in whose custody the prisoner is, without any caution whatever (questions which bear materially upon the criminality of the prisoner, and are manifestly put in order to establish his guilt by his answers), whether, I say, the answers to such questions are properly admissible in evidence against the prisoner ? [His lordship here read the evidence of the policeman.] It is manifest that the policeman asked those questions for the purpose, not of regulating his conduct, but of eliciting from the prisoner an answer that would establish her guilt ; and, accordingly, when the prisoner stated that she had been made a present of the boots in Kingstown, he sought by his next question to elicit a contradiction or retraction of that statement, by telling her that she had been seen in Mr. Hutchings's shop, and asking her was it not there she got them ? Having attained his object, he then goes through the mockery of giving her a caution.

The habit of prisoners being interrogated by the civil authorities with a view to establish their guilt, prevails in other countries. In

some, even a prisoner on trial is exposed to a searching examination. That practice is not in accordance with the principles of our criminal law. A prisoner, upon his trial upon a plea of not guilty, before any criminal tribunal in this country, from the highest to the lowest, cannot be interrogated as to any matter whatever; and I trust that the practice prevailing in other countries will never be legalized here. Such being the rule by which all our criminal courts are bound, would it not be strikingly inconsistent to hold that the inferior officers of justice, in their proceedings before the trial, are exempted from it? that they may do what the highest tribunal could not; and endeavor to secure the prisoner's conviction by eliciting, previously to the trial, answers to questions which could not then be put?

The legislature, by recent statutes, has indicated the course which should be adopted towards a prisoner before his trial. [His lordship read the 14th section of the Petty Sessions Act (14 & 15 Vict. ch. 93), and also referred to the form given in schedule A for the prisoner's statement.] These enactments show that the intention of the legislature was to give the prisoner an opportunity of making any statement he desired; but not to allow the magistrate to interrogate him, save by asking him, in general terms, if he desired to say any thing in answer to the charge. If, however, the magistrate went further, and interrogated the prisoner as to his guilt, or as to the facts relied on to establish it, — if (as done by the policeman in the present case) the magistrate, not satisfied with the first answer of the prisoner asserting his innocence, sought to contradict it by further questions, can it be doubted that the magistrate, by so doing would transgress his duty, and that the statement of the prisoner, in answer to such interrogatories, would not be receivable in evidence under the act?

These enactments were framed for the purpose of providing that the statement of the prisoner should be voluntary, and not extracted by questions; and should not be made until after he was apprised of the effect it might have against him; and also for the purpose of guarding against the inevitable inaccuracies and mistakes that would occur if the proof of the prisoner's statement rested merely on the fallible memory of those who heard it. Would it then be in accordance with the policy of these enactments to hold that, either previous or subsequent to this inquiry under the statute, the prisoner, while in custody, might be interrogated and

cross-examined by the magistrate or policeman in whose custody he was, as to details and circumstances tending to establish his guilt; and that his answers to such questions might be proved against him at the trial, although the questions were put without any caution whatever, and without apprising the prisoner of his being at liberty to answer them or not, as he thought fit? The admission of such evidence would, in my opinion, frustrate the policy of the act, and render the securities thereby provided with regard to the prisoner's statement of little or no value.

With respect to the proviso at the end of the 14th section, which has been relied on by the crown counsel, namely, that nothing therein "contained should prevent the prosecutor from giving in evidence any admission, confession, or other statement, made at any time by the prisoner, which would be admissible by law as evidence against him." It appears to me that such proviso refers to voluntary statements, made by the prisoner of his own accord, but not to answers given by him, while in custody, to questions put by magistrates or policemen.

Independent of the inference to be deduced from these provisions of the statute, it appears to me that answers given by a prisoner to questions put to him by those in whose custody he is, respecting the offence with which he is charged, cannot be regarded as voluntary statements, except the prisoner be at the same time apprised that he is not obliged to answer them, and that his answers may be given in evidence against him at his trial. The very fact of these questions being put by such a person, unaccompanied by any such caution, conveys to the prisoner's mind the idea of some obligation on his part to answer them, and deprives the statement of that voluntary character which is essential to its admissibility.

This was the view taken by Chief Baron Richards and Chief Justice Wilde, in two cases, *Rex v. Wilson*, Holt N. P. C. 507, and *Regina v. Pettit*, 4 Cox C. C. 164, to which I shall hereafter refer, in which they rejected the evidence of admissions elicited from the prisoner by questions put to him by a magistrate; Chief Justice Wilde stating, in the case before him, that "A person in custody, or other imprisonment, questioned by a magistrate who had power to commit him and power to release him, might think himself bound to answer, for fear of being sent to jail;" and that "the prisoner's mind in such a case would be likely to be

affected by the very influences which render the statements of accused persons inadmissible."

It is a well established rule that, before a statement made by a prisoner is admissible against him, the court should be clearly satisfied that such statement was voluntary.

In the case of *The Queen v. Warringham*, Baron Parke, with reference to a confession tendered in evidence, remarked that "It did not appear that such confession was not made in consequence of some improper inducement; and that, though the evidence left that fact doubtful, the onus lay upon the Crown to prove the negative; that they were bound to satisfy him that the confession was not obtained from the prisoner by improper means; and that, in the case before him, he was not satisfied of that fact." He accordingly rejected the evidence, stating that he did so "because he was not satisfied that it was voluntary;" and the prisoner was acquitted. Although, in that case, the confession was objected to in consequence of an inducement having been held out, these observations of Baron Parke appear applicable to all cases where, upon any other ground, the confession is not to be regarded as having been voluntary.

In another case, *The Queen v. Moore*, Baron Parke also refers to the ground upon which confessions should be admitted in evidence. If we apply these principles to the case now before us, can we say that the prisoner did not answer the questions because she feared that, if she did not do so, the policeman would take her to jail? Is it not, on the contrary, clear that the course of proceeding adopted by the policeman was reasonably calculated to produce that impression on her mind? It may be said that, whatever be the motive which induces a prisoner to answer questions or make a statement, it is not to be supposed that he would give an untrue answer to his own prejudice, or would falsely criminate himself; but, as to this, I would refer to the observations of Lord Campbell in *Baldry's Case*, where he states his opinion, "That the rule excluding confessions made in consequence of inducements held out, did not proceed upon the presumption that the confession was untrue, but rather that it would be dangerous to receive such evidence; and that, for the due administration of justice, it was better that it should be withdrawn from the consideration of the jury."

I shall now refer to some of the cases relied on in the argument,



in which the question of the admissibility of such evidence arose ; and I shall commence with some decided in this country. In *The Queen v. Margaret and Patrick Hughes*, 1839, 1 Crawford & Dix C. C. 13, it appeared that a statement of the prisoner (which was however consistent with his innocence) had been elicited from him ; and Chief Justice Doherty expressed, in strong terms, his disapprobation of the system of questioning prisoners. He referred to the cautions given by magistrates in receiving a prisoner's statement, which were seldom given by persons of an inferior class. He also mentioned a case in which he himself had observed upon the impropriety of a police officer interrogating a prisoner ; and another case in England, in which he had heard similar opinions expressed by the presiding Judges ; and he concluded by stating that, in future, he never would permit admissions obtained from prisoners in such a manner as had been done in the case before him to be given in evidence.

Again in the case of *The Queen v. Doyle*, March 1840, 1 Crawford & Dix C. C. 396, Chief Justice Bushe held that the prisoner's answer to a question put to her by a policeman, while she was in custody, was not admissible in evidence, although the policeman had previously cautioned her against saying any thing that would criminate her.

In another case, of *Regina v. Devlin*, 2 Crawford & Dix C. C. 151, before Burton J., the prisoner was tried for having in his possession copies of passwords of the Ribbon Society ; and while the prisoner was in custody, a policeman showed him the above papers, and asked him " whether or not he knew any thing about them ? " (a question, I may observe, far less objectionable than some of those put in this case) ; the prisoner's counsel objected to the prisoner's answer being given in evidence, and relied on the two cases I have already mentioned before Chief Justice Doherty and Chief Justice Bushe. Counsel for the Crown disputed the authority of these two decisions, on the same grounds as were relied on by the crown counsel in the present case ; but Mr. Justice Burton, after conferring with Chief Baron Brady, stated their joint opinion that the prisoner's answer should not be received in evidence ; and the prisoner was acquitted.

Again in the two recent cases of *Regina v. Gray*, 7 Cox C. C. 246 note, before the present Lord Chief Justice, and *Regina v. Bodkin*, 8 Irish Jur. N. S. 340, before the present Lord Chief Baron, it

was held that answers given by a prisoner in custody, to questions put to him by a constable (though the constable had given the prisoner a previous caution), were not admissible in evidence; the chief baron stating in the case before him that, where a constable arrested a prisoner, he should not put such questions to him.

It is well known that Mr. Justice Perrin frequently rejected, on similar grounds, evidence of such statements by prisoners.

We have thus a series of successive decisions in this country, during the last twenty-five years, in which such evidence has been rejected (although in some of them the prisoner, before being questioned, had been cautioned in the usual manner), and there is no reported decision to the contrary by any of the Irish Judges during that period, with the exception of the late Mr. Justice Cramp-ton, who expressed his opinion of its admissibility, in the case of *The Queen v. Hughes* mentioned in Mr. Joy's *Treatise on Confessions*, pp. 39, 40.

Before observing upon *Gibney's Case*, *Jebb's Reserved Cases*, 15, which was so much relied on for the Crown, I shall refer to some of the cases decided in England on this question.

In *Rex v. Wilson*, Holt N. P. C. 597, already mentioned, it appeared that a magistrate had examined the prisoner at length, as a witness, but had not sworn him, or held out any inducement or threat. Chief Baron Richards however rejected the evidence of the prisoner's examination, stating: "No matter whether the prisoner be sworn or not, *an examination, of itself, imposes an obligation to speak the truth.* If a prisoner will confess, let him do so voluntarily. Ask him what he has to say. But it is irregular in a magistrate to examine a prisoner in the same manner as a witness is examined. I must reject this evidence." The prisoner was acquitted.

It appears to me that the ground upon which Chief Baron Richards rejected this evidence, namely, that the very fact of the prisoner being examined imposed upon him an obligation to speak the truth, is equally applicable to the case of a prisoner being examined by a policeman; and the more so, in the present case, in which the mode of questioning was such as would be adopted on cross-examination of an adverse witness.

It is true that the authority of *Rex v. Wilson* was denied by Mr. Justice Littledale, in a subsequent case, *The King v. Ellis*,

Ryan & Moody N. P. C. 432, where it appeared that part of the prisoner's examination had been elicited by questions put by the magistrate. Chief Baron Richards's decision was relied on by the prisoner's counsel, against the reception of such examination in evidence ; but, on reference to a statement in Starkie on Evidence (p. 29 note, vol. 2 of ed. 1833) that Mr. Justice Holroyd had, in a case before him, received an examination to which there was a similar objection, Mr. Justice Littledale expressed his opinion that Mr. Justice Holroyd's decision was the correct one, and that the evidence was, upon principle, admissible. It appeared further however that the magistrate had refused to allow the prisoner professional assistance ; and upon that ground Mr. Justice Littledale suggested that the case should not be further pressed ; whereupon the prosecution was abandoned and the prisoner acquitted.

Though the previous decision of Richards C. B. was disapproved of by Mr. Justice Littledale, it should not, I think, be considered as overruled by the case before him, as the evidence was virtually rejected, though upon another ground. It is also to be observed that the case before Mr. Justice Holroyd, upon which Mr. Justice Littledale relied, is mentioned only in Mr. Starkie's note, where the facts are not given ; nor does it appear that the decision of Richards C. B. was cited before him.

But the principle which Chief Baron Richards laid down in *Rex v. Wilson* was stated in stronger terms by Wilde C. J. in the case already mentioned, of *Regina v. Pettit*, 4 Cox C. C. 164. In that case it was proposed by the Crown to give evidence of questions put to the prisoner by the magistrates before whom he was brought, and of his answers to them ; which was objected to by prisoner's counsel. The crown counsel relied on the provisions of the 11 & 12 Vict. ch. 42 § 15 (similar to the concluding proviso in the 14th section of the Irish Act, 14 & 15 Vict. ch. 93, which has been relied on in this case) and they contended that the statement of a prisoner, whether to an ordinary witness or policeman or magistrate, should not be excluded on the mere ground of its having been elicited by questions. Chief Justice Wilde however stated : " I think I ought not to receive this evidence, and I reject it ; on the ground that magistrates have no right to put questions to a prisoner with reference to any matters having a bearing on the charge upon which he is brought before them. The law is so extremely cautious in guarding against any thing like torture, that it extends

a similar principle to every case where a man is not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him and power to release him, might think himself bound to answer, for fear of being sent to jail. The mind, in such a case, would be likely to be affected by the very influences which render the statements of accused persons inadmissible."

The evidence was accordingly rejected, and the prisoner acquitted.

These observations of Chief Justice Wilde, and the rule so expressly laid down by him, are, in my opinion, equally applicable to the present case, where the questions were put by the policeman in whose custody the prisoner was, and who had the power of bringing her to jail or letting her go free. If answers given by a prisoner, when questions are put by a magistrate, be not admissible in evidence, I can see no reason why they should be so when the questions are put by a policeman. It was truly stated by Chief Justice Doherty, that the system of a prisoner being questioned by a policeman is even more objectionable than if questioned by a magistrate, whose higher position and responsibility afford a better security against the abuse of the system. It has indeed been suggested that answers given by prisoners to questions put by magistrates are rejected, because magistrates are regarded "*as persons in authority.*" But it appears to me that, in reference to the question now before us, a policeman in whose custody the prisoner is should also be regarded as "*a person in authority.*" A confession, made in consequence of a threat or inducement held out by such policeman, is equally inadmissible in evidence as if such threat or inducement was held out by a magistrate; because in both cases it is considered that the threat or inducement is used by "*a person in authority.*" Why therefore should it be held that the objection to the admissibility of a prisoner's answers to questions put by a magistrate on the ground that he is "*a person in authority,*" does not equally apply to the case where such questions are put by the policeman?

It will be also observed that Chief Justice Wilde made that decision notwithstanding the reliance of the crown counsel on the proviso in the 11 & 12 Vict. ch. 42 § 18, similar to the proviso

already mentioned at the end of § 14 of the Irish Act, 14 & 15 Vict. ch. 93.

That case, before Chief Justice Wilde, was probably the one referred to (though not by name) in the argument of prisoner's counsel in Baldry's Case, as a decision that a statement by a prisoner, in answer to questions, was not admissible in evidence; when Lord Campbell stated, as a general rule: "Prisoners are not to be interrogated. By the law of Scotland, they may be, but, by the law of England they cannot."

We have next the case of *Regina v. Berriman*, 6 Cox C. C. 388, before the present Chief Justice Erle. In that case a statement of the prisoner, in answer to questions put by a policeman, was given in evidence, without, as it appears, any objection by prisoner's counsel (probably because the statement was not material) but Chief Justice Erle, in that stage of the case, strongly expressed his disapproval of the practice of policemen questioning a prisoner. He stated: "I very much disapprove of this proceeding. By the law of this country, no person ought to be made to criminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories, with a view of ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to." Again he says, in reference to what had been done in that case: "I wish it to go forth amongst those who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law."

In a subsequent part of the trial before Chief Justice Erle, the question as to the admissibility of such evidence was expressly raised. The prisoner was indicted for the murder of her child, and after she had been duly cautioned, and had stated that she had nothing to say, the magistrate, before committing her, asked her: "Where she had put the body of the child?" Prisoner's counsel objected to her answer being received in evidence. The prosecuting counsel contended that it was admissible, as the magistrate had not at the time committed her for trial, and the questions might have been put with a view to guide him in the exercise of his dis-

cretion as to committing her or not. Erle C. J. however said : " I shall certainly refuse to allow any such evidence to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence answers so irregularly elicited.

Counsel for the prosecution then proposed to ask a witness whether, in consequence of the answer which the prisoner had given to the magistrate, he had made a search and found any thing, but Erle C. J. refused, saying : " No ; not in consequence of what she said. You may ask what search was made, and what was found ; but, under the circumstances, I cannot allow that proceeding to be connected with the prisoner." The result of the rejection of the evidence was the acquittal of the prisoner. In these observations Chief Justice Erle clearly defines the objects for which alone policemen should examine or interrogate suspected parties ; the limits within which such examination should be confined, and the manner in which it should be conducted ; and I have referred to them in detail for the purpose of meeting an argument much pressed upon us by the crown counsel ; namely, that in most cases it was absolutely necessary that magistrates and policemen, with a view to the proper discharge of their duties, should interrogate suspected parties.

It appears to me that the questions put in the present case are not in accordance with the rule laid down by Chief Justice Erle, or within the limits which he prescribed.

We have then, on these several Irish and English cases, express decisions that statements of a prisoner, made under circumstances substantially the same as those in the present case, are not admissible in evidence. These decisions were made by eminent Judges, experienced in criminal law, and of whom it certainly could not be said, as in the case referred to by the crown counsel, that " they were disposed to sacrifice justice or common sense on the shrine of mercy or of guilt." It is true that these several decisions were the rulings of single judges, but they are not on that account to be disregarded. In some, the reasons are fully and carefully stated. In almost all, the evidence offered was essential to the case for the prosecution, and in consequence of its rejection the several prisoners were acquitted ; which shows that the several Judges must have been clearly satisfied that the evidence was not admissible ; as, if they considered it doubtful, they would not, by rejecting the

evidence, have made a ruling from which there could be no appeal ; but would, as of course, have received the evidence, and reserved the point for the consideration of the Judges, or of the Court of Criminal Appeal, which latter court had been established some years before the cases decided by Chief Justice Erle and Chief Justice Wilde, by my Lord Chief Justice and Chief Baron Pigot.

It has been also urged by the crown counsel, during the argument, that in several of those cases the rejection of the evidence may be accounted for by the circumstance that the questions put to the prisoner assumed his guilt. Even supposing that to be material, it may be said that the question put in this case by the policeman about Mr. Hutchings's shop was of that character ; but it does not appear that in any of those cases that circumstance was made a ground of the decision ; and it appears to me that, supposing the question put to bear upon and be so connected with the charge against the prisoner, that an answer to it in one way would tend to establish his guilt, it is immaterial, so far as the admissibility of the evidence is concerned, whether the question does or does not in its form assume the fact of such guilt. It would be a most embarrassing rule, easily evaded and incapable of being applied with any certainty in the great majority of cases, to hold that the admissibility of the evidence depended upon the form of the question, whether it assumed the prisoner's guilt, or assumed the answer to it ; whether it was leading or otherwise ; or such as could only be put upon cross-examination. In many cases this rule might be altogether evaded by altering the form of the question, and yet putting it in such a manner as to produce the same answer from the prisoner.

I shall now refer to the cases relied on by the Crown in opposition to this current of authorities. The principal cases are Gibney's Case, Jebb C. C. 15, and *Rex v. Thornton*, 1 Moody C. C. 27, and *Rex v. Wild*, 1 Moody C. C. 452, in 1824 and 1835. As to these three cases, it is to be observed that none of them was argued by counsel, and that it does not appear that in any of them the Judges considered or at all referred to the question now before us ; namely, whether a prisoner's statement was inadmissible in evidence upon the particular ground that it was made in answer to questions bearing upon the offence, and put to him by the policeman or party in whose custody he was.

It is true that in *Gibney's* and *Thornton's* Cases the prisoners' statements were made in answer to such questions, so that the facts of those cases admitted of that point being raised ; but the point was not referred to either in the reservation of the Judges who tried the cases, or in the reasons given by the Judges for their decisions. Thus in *Gibney's Case*, before the Judges of Ireland (the facts of which have been already stated), the terms of the question reserved were, whether the confession did not result from the prisoner's mind having been excited to terror by the persons by whom he was conducted to jail ; and therefore whether it was such a voluntary confession as ought to be given in evidence against him ; and the decision of the Judges was that, in order to render a confession inadmissible on the ground of its being produced by fear, the fear must be of a temporal nature ; and that in the case before them there was no such fear, nor was any threat or intimidation used. Though the conviction was affirmed, the prisoner was not executed.

In that case also it appeared that, in making the confession, the prisoner stated " he was willing to die, and hoped that God would have mercy on him ; " and also stated " that his conscience would not let him conceal it any longer. "

The question therefore which the Judges considered was, whether the prisoner's confession resulted from fear of a temporal nature, produced by the acts and speeches of the persons who surrounded him, or from terror as to what would be the consequences of his crime in the other world. The point now before us was not referred to ; if it had been raised, it might have been considered that the objection on the ground of the statement having been elicited by questions was removed by the subsequent explicit statement of the prisoner himself, that the motives which induced his confession were the dictates of his own conscience, and the apprehension of a future state. But, as the case stands, I do not think it can be regarded as a decision on the question now before us. It is also to be observed that two of the Judges who decided that case were Chief Justice Bushe and Mr. Justice Burton, who, notwithstanding that case, rejected such evidence in the two subsequent cases already referred to from 1 & 2 Crawford & Dix C. C. It is therefore to be presumed that they did not consider that the point in question had been ruled in *Gibney's Case*. If they had, their decisions would have been otherwise ; and this confirms the



supposition that the question had not been at all considered in it. It may be that, when Gibney's Case was decided, the practice of a policeman interrogating a prisoner had not prevailed to such an extent as to direct the attention of the Judges to the question whether the statements made by the prisoner in reply were not, on that ground, inadmissible in evidence.

Again in Thornton's Case, 1 Moody C. C. 27, the terms of the question reserved were, whether a confession obtained when the detention of the prisoner was *perhaps illegal*, and when the conduct of the officer was calculated to intimidate, was admissible in evidence. [The learned judge stated the facts of this case from the report.] And the ruling of the majority (three eminent Judges, Best C. J., Bayley J. and Holroyd J. dissenting) was, that the confession was rightly received, on the ground that no threat or promise had been used. It appears therefore that the only point reserved for the Judges, or decided by them in Thornton's Case, was as to the effect of the illegality of the custody, and as to the existence of intimidation on the part of the officer; and that (as I have already observed respecting Gibney's Case) the question now before us was not referred to or answered.

It may, I think, be stated as a general rule, that when a particular question or ground of objection is not referred to, either in the judgment or argument of any case (though the facts admitted of its being raised), then the decision in the case is not to be regarded as a *decision* on that particular point, especially if the case was not argued by counsel; though, if that case was not encountered by other authorities, it may be relied on as showing that the objection was not considered valid.

With respect to *Rex v. Wild*, 1 Moody C. C. 452, it appears that the question was reserved generally; namely, "whether the confession was admissible in evidence?" and the opinion of the Judges was equally general; namely, that the confession was admissible; and it does not appear from the report what the ground of such opinion was. It is also to be observed that neither of the persons who put the questions to the prisoner in that case was a constable; and that though one of them, Mr. Wragg, was the person who had taken the prisoner into custody, yet that the answer to his question did not criminate the prisoner, and was in fact only a refusal by the prisoner to make any statement whatever. The questions in answer to which the prisoner made statements that tended to prove

his guilt were put by two other persons (W. Clarke and the innkeeper's son) and it does not clearly appear that Wragg, who arrested him, was present at any such questions. With respect to the confession to the innkeeper's son, he proved that the prisoner, without any promise or threat held out, or question asked by the witness, stated, "*that he would tell* witness all about the matter, and that he did not exactly mean to drown the children;" thus voluntarily admitting that he had done so. That case also was not argued by counsel; and having regard to the peculiar circumstances of it, and to the fact that the reasons of the Judges are not given, the decision in it cannot, I think, be regarded as a decision on the point now in question. In that case also the Judges expressed their disapprobation of the mode in which the confessions had been obtained, and the prisoner's sentence was commuted from death to transportation.

The case of *Regina v. Kerr*, 8 Carrington & Payne, 176, has been relied on for the Crown, as if it were an authority for the admissibility of such evidence. Upon referring to it however it will be found that there was no such decision in the case. The prisoner's counsel did not object to the admissibility of the confession in evidence; but, in his address to the jury, commented strongly upon the impropriety of the policeman questioning the prisoner without a caution; and the observations of Mr. Justice Allen Park, in his charge to the jury, were merely to the effect that he thought it better that such a practice should not be adopted, though it did not appear to him that there was any impropriety in the policeman's conduct.

The case of *Rex v. Bartlett*, 7 Carrington & Payne, 832, before Baron Bolland, has also been relied on, but will be found upon examination not to affect the present question. In that case, the evidence of the prisoner's examination was objected to, on the alleged ground that parts of it were in answer to questions put by the magistrate; but the magistrate, who was examined at the trial, stated he had no recollection of having put any questions; and that, if he had, he certainly put none except for the purpose of explaining what had been already said by the prisoner. The point now before us did not therefore arise in that case; and the decision of Baron Bolland was merely in these words: "The examination must be read."

Another case relied on for the Crown is that of *Rex v. Court*,

7 Carrington & Payne, 486, where the evidence of the prisoner's examination before a magistrate was objected to, not on the ground of its having been elicited by questions, but because the magistrate (after the prosecutor had made a statement in prisoner's presence) told the prisoner "to be sure to tell the truth;" which prisoner's counsel contended was an intimation to him that it would be better to confess the charge. Little Dale J. merely decided that what the magistrate said was no inducement; and that therefore the evidence was receivable. That case therefore is also no authority on the present.

The question however appears to have arisen in *Rex v. Rees*, 7 Carrington & Payne, 568, where Lord Denman admitted in evidence the prisoner's statement before the magistrate, though part of it was in answer to questions put by the magistrate. But in that case it appears that the statement was taken under the provisions of the English Act (7 Geo. IV. ch. 64) as it was received in evidence without the magistrate or his clerk having been examined. It may therefore be presumed that any questions put by the magistrate were preceded by a proper caution; and, as the report does not state what the questions were, it might be that they were of the same character as in the case of *Rex v. Bartlett*, above referred to; namely, to explain what the prisoner had already said. Much would of course depend on the nature of the questions; as there are cases, such as those referred to by Erle C. J. in *Regina v. Berriman*, 6 Cox C. C. 388, in which questions of a certain character may be unobjectionable.

In Baldry's Case, which was also relied on, no question appears to have been put to the prisoner; and the objection taken to the admissibility of the prisoner's statement was, that the words of the caution given by the policeman were, that what the prisoner said "*would*" be used "against him," instead of the words "*might*" be used "against him."

In *Regina v. Cheverton*, 2 Foster & Finlason, 833, to which we have been also referred, the prisoner was indicted for infanticide. A policeman had said to the prisoner, "You had better tell all about it; it will save trouble." He then put questions to her; and the evidence of her statement made in answer to such questions was objected to, on the ground that it was made under a threat or inducement by a person in authority. Erle C. J. rejected the evidence. Another policeman afterwards went to the prisoner. She

said, when she saw him, "Ah! I expected you." He then put various questions, bearing materially upon the charge against her; and the admissibility in evidence of her statement in answer to those questions was objected to, on the ground that she made it under the influence of the same inducement as was held out by the other policeman. Chief Justice Erle, having consulted Justice Wightman, stated their opinion that, though the former statement was inadmissible, there did not appear the same reason for excluding the second. He stated however that he would reserve the point. This was not done, as the prisoner was acquitted; but the fact of his having agreed to reserve the question showed that he considered it a doubtful one. It appears also that, without the prisoner's statement, there was not sufficient evidence to sustain the prosecution. I think therefore that, under these circumstances, his reception of the evidence, on the terms of the question being reserved, should not be regarded as a decision that it was legally admissible; and the observations made by him in his charge to the jury show the inclination of his own opinion on the subject, as already expressed by him in *Regina v. Berriman*, 6 Cox C. C. 388. He told the jury that, for the policeman to put such questions without a caution was most improper, especially since the prisoner did not seem to have been aware of their drift or object. It appears further, from the note in 2 Foster & Finlason, p. 834, that, in charging the grand jury, he had observed upon the proceeding as very improper: and that Cockburn C. J. during the same assizes, on another circuit, expressed a similar opinion in a similar case.

The general result of the authorities therefore appears to be that, in Ireland, *wherever the objection was raised at the trial*, the evidence was invariably rejected, except in the case already referred to before the late Mr. Justice Crampton; and the only other Irish decision relied on in support of its reception is *Gibney's Case*, on which I have already observed.

With respect to the English authorities, I have also stated my opinion as to the two cases cited from Moody's Reports, in which the question was not raised. As to the other English cases in which the objection was made at the trial, there certainly appears to be a conflict of authority on the question; but in my opinion the preponderance of authority is against the reception of the evidence. It is also to be observed that even the Judges who have

received such statements in evidence, almost invariably expressed their strong disapproval of the system of questioning prisoners; and Mr. Justice Patteson, in a case mentioned in Roscoe's Criminal Evidence (6th ed. p. 48) threatened to have a constable, who had been in the habit of interrogating prisoners in his custody, dismissed from his office. Such being the opinion of the Judges, would it not be inconsistent to hold that the evidence might be used for the conviction of the prisoner, while at the same time the manner in which the evidence is procured, and the parties who give it, are so strongly condemned?

There are many cases in which the system of questioning prisoners by policemen leads to the discovery of other evidence, and is perhaps necessary for the purpose of guiding the police in their subsequent inquiries, and of insuring the detection of guilt. At present, the police may fairly be deterred from adopting that system by the apprehension of the censure to which they would subsequently be exposed, when the answers to such questions should be given in evidence at the trial. It would in my opinion be far better, for the administration of justice, to hold that the police should be at liberty, without the risk of censure, to question a prisoner, so far as might be fit and requisite for the guidance of their own conduct, and for the discovery of other evidence; but that the answers to such questions should not be given in evidence against the prisoner on his trial.

On these several grounds, I am of opinion that the evidence in question was improperly received at the trial, and that, accordingly, the conviction should be reversed.

KEOGH J. concurred with Baron DEASY, that the conviction should be affirmed.

BALL J. The principle which I consider has been established by the English authorities, as well as by some of the Irish decisions, amounts to this, that statements made by a prisoner in answer to questions put to him by a police constable, *without any previous caution*, are admissible in evidence against him on his trial, provided there has been no threat or inducement held out calculated to influence him to make the statement. For this I refer, in the first instance, to Thornton's Case, 1 Moody C. C. 27, which was ruled so far back as 1824. It was there decided, by seven of the

Judges of England, including Lord Tenterden, against three others, that admissions made by a prisoner (being, in that instance, a boy only fourteen years of age, and who had been kept without food during a great part of the day), in answer to questions put to him by a constable *without any previous caution*, were admissible in evidence against him on his trial, on the specific ground that no promise or threat had been held out to him calculated to induce him to make the admissions. It appears also that the three dissentient Judges, who held that the evidence ought not to have been admitted in that case against the prisoner, did so, not because it had been elicited by questions put by the constable, but because they considered that the conduct of the constable in the transaction had been calculated to intimidate the prisoner.

I refer next to *Gibney's Case*, *Jebb C. C. 15*, decided in 1822, when all the Judges of Ireland held unanimously that a confession made by a prisoner, which had been elicited by questions put to him by a police constable, *without a previous caution*, was properly received in evidence, on the ground that it was the *voluntary* act of the prisoner, not induced by either hope or threat. Thus the twelve Judges of Ireland, it appears by the report of that case, held "the rule to be well established that a *voluntary* confession shall be received in evidence against a prisoner; but if hope has been excited, or threats or intimidation held out, it shall not be admitted."

In *Gibney's Case*, it is to be observed that it does not appear that any previous caution whatever had been given to the prisoner: but the police constable proceeded at once to say to the prisoner: "You must be a very unhappy boy, to have murdered your own child, if it be the case. Did you kill the child?" To which the prisoner replied "that he had done so about a fortnight before May."

Now here is a case where all the Judges of Ireland, including the late Chief Justice Bushe as well as the late Mr. Justice Burton (the authority of both of whom, as we shall see presently, is invoked as having decided the contrary in another case) held deliberately that a confession obtained from a prisoner, through the instrumentality of questions from a police constable, was properly received in evidence, *without any previous caution* having been given to the prisoner.

The next decision to which I refer is *Wild's Case*, *1 Moody C. C.*

452, where all the Judges of England who had assembled, to the number of eleven, held unanimously that statements made by a prisoner, in answer to questions put to him by a person not in authority, and *who had given him no previous caution*, were, in strictness, receivable in evidence against him; but at the same time they expressed their disapproval of the mode in which the statements had been obtained, by questioning the prisoner. This case was ruled in 1835; and it appears by the report that the prisoner was at the time under fourteen years of age.

Then there comes to be considered *Regina v. Kerr*, 8 Carrington & Payne C. C. 176, where Park J. admitted evidence of answers made by a prisoner, to questions put to him by a constable, *without any previous caution*.

In reference to that case, it is to be observed that, so satisfied do both the Bar and the Bench in England appear to have been, at the period when it was decided (1837), that the law had been definitively settled by the previous decisions, as to the admissibility of such evidence, that the prisoner's counsel did not even object to the evidence being given, but contented himself with complaining, to his address to the jury, of the hardship on the prisoner to have had questions put to him by the constable, without having been previously cautioned: whereupon Park J. expressed himself quite satisfied that the evidence was receivable *without any previous caution* having been given; adding however that, as a general rule, he considered it better that the caution should be given, and that, if he were himself in the position of a police constable, he would not have put a question to the prisoner without administering the previous caution.

Thus we have, in that case, the distinction taken by Mr. Justice Park (as it has been so often taken by other Judges both in Ireland and in England) between the legality of the practice and its expediency; holding that, while he disapproved of it as a general rule, he felt bound to assert its undoubted legality when acted on; or, in other words, that though he might wish it were not the law, yet, being satisfied that it was so, he must submit to it.

I do not here mention *Bartlett's Case*, 7 Carrington & Payne, 832, or *Rex v. Ellis*, Ryan & Moody N. P. C. 432, or other cases in England, which were relied on in the argument at the bar, as instances of the application of the doctrine of admissions made by prisoners, in answer to questions put to them by *magistrates*,

being afterwards received in evidence against them on their trials, — for this reason, that those decisions appear to me inapplicable to the question we are now considering, which has reference to the practice of constables obtaining admissions from prisoners by means of questions put to them; whereas the class of cases to which I have just now referred stands upon a different ground, as we shall presently find.

There may be other English authorities to the same effect as those on which I have relied for the establishment of the general principle, but I deem it unnecessary to notice them; as the latest case in England on the subject (so far as I have been able to ascertain) which was decided in the course of the year 1862 or 1863, affirms the general doctrine of the admissibility of such evidence, although no previous caution had been given to the prisoner; I refer to the case of *Regina v. Cheverton*, 2 Foster & Finlason, 833. In that case, a statement had been made by a prisoner, in answer to a question asked of him by a police constable, and without its appearing that a previous caution had been given; and, on the part of the Crown, it was proposed to be given in evidence against the prisoner on his trial; but Erle J. rejected it, not on the ground of the statement having been obtained from the prisoner by means of questions from the police constable, but because it appeared that there had been some threat or inducement practised by the constable in obtaining the prisoner's answer to the question. The crown counsel then offered in evidence another statement, made afterwards by the prisoner to the inspector of police, and in answer to questions asked of him by the inspector, *who had given the prisoner no previous caution*; and this latter statement was allowed to be given in evidence by Erle J. after a conference with Wightman J.; both Judges considering that it had not been made under the influence of the threat or inducement which had rendered the first statement inadmissible. Then what was the difference between the two statements made by the prisoner in the foregoing case, which would account for the one being rejected in evidence while the other was admitted? Both statements, be it observed, were made in answer to questions from the police, without a previous caution in either case; but the difference between them was this: the former was considered by the judge to have been made under the influence of some hope or threat, proceeding from the police, whereas the latter, though similar in all other respects to the for-



mer, was free from the influence of hope or threat, which had rendered the former inadmissible.

Thus the general result of the foregoing cases appears to be, that, from the year 1822 down to the present time, — that is, for a period of upwards of forty years, — it has been recognized as the law of the land, both in England and Ireland, that admissions or statements obtained from prisoners through the instrumentality of questions from police constables, without any previous caution, are admissible in evidence against them; provided that such admissions or statements be the voluntary acts of the prisoners, not induced by either hope or threat operating on their minds.

Then I ask, how is this host of authority to which I have referred encountered on behalf of the prisoner? It is met by two cases in England, which are supposed to have established the contrary doctrine; and by decisions of some of the Judges in Ireland, which are, in like manner, supposed to be counter to the English authorities.

I propose to show that neither of the English cases, which have been relied on at the bar as containing a contrary doctrine, has that effect; and that the decisions of the Irish Judges do not conflict with the English authorities.

I take, first, the case of *The Queen v. Pettit*, 4 Cox C. C. 164, which, at first sight, might appear to be in principle the same as the case now before the court. I have first to observe, with respect to this case, that whereas by the statute of the 7 Geo. IV. magistrates had been authorized to interrogate prisoners brought before them for examination, in respect of the offences with which they stood charged, they were deprived of that power by the 11 & 12 Vict. By the former act, magistrates had been expressly directed to “take the examination of prisoners,” in like manner as they had been directed to do so by the old statute of Philip and Mary, in England, and the corresponding act in Ireland.

We know historically that there had been periods in the history of both countries when that power, conferred by statute on magistrates, had been much abused in practice; and at length it was judged expedient by the legislature that it should cease to be exercised. Accordingly the 11 & 12 Vict. (Eng.) corresponding to the 14 & 15 Vict. (Ir.) was enacted, whereby the 7 Geo. IV. was repealed, and the provision contained therein, that the magistrates should “take the examination of the prisoner,” was not re-enacted

in the new statute ; which, in lieu thereof, authorized the magistrate to put one question, and one only, to the prisoner ; namely, “ does the prisoner wish to say any thing as to the charge brought against him ? ” — or to that effect.

Now, the case of *Regina v. Pettit* was ruled (if I recollect right) in the year 1850, and the 11 & 12 Vict. was passed in England in the year 1846 ; so that the ruling in that case must be looked at by the light afforded by that statute, which was then in full operation. Accordingly, when it was proposed by the counsel for the Crown, in the case of *Regina v. Pettit*, to give in evidence against the prisoner a statement made by him, in answer to questions put to him, — not by a police constable, be it observed, but by the committing magistrate, — Wilde C. J. refused to admit the evidence, and put his refusal on the distinct ground that the magistrate had no power, as the law then stood, to question the prisoner at all (save as above mentioned) ; and accordingly that the answers of the prisoner to other questions, not authorized by the statute, could not be received in evidence against him.

Thus, it appears that the ruling of Wilde C. J. in the foregoing case in no way conflicts with the authorities both in England and Ireland, which have held that the statements made by a prisoner in answer to questions put to him by a police constable, provided there be no inducement and no threat, are in point of law admissible in evidence against him on his trial.

I abstain from discussing the matter which has been so much pressed at the bar, as to the anomaly which is supposed to exist if it be held that, whereas the magistrate is by law debarred from questioning a prisoner, save in the manner, and accompanied by the caution prescribed by the act, the inferior officer, the police constable, should be at liberty to examine the prisoner at large, and without any caution, and to give in evidence against him the statements so obtained. It is enough to observe, in reference to that matter, that it is for the legislature to correct that supposed anomaly if they think fit. The law on the subject, as we have seen, was well understood and settled by authority, both in England and Ireland, when the 11 & 12 Vict. was passed ; and the legislature, when by that act it deprived the magistrate of the power of questioning the prisoner, and left it in the power of the police constable to do so, we must suppose was actuated by wise reasons for taking that course ; possibly they may have deemed it right,

with a view to the detection of crime, and to facilitate bringing the offender to justice, to enable the constable to question the prisoner ; although they may not have thought fit to extend the same power to the magistrate.

The other English case which has been relied on by the prisoner's counsel as an authority for the position that an admission made by a prisoner, in answer to questions put by a police constable without a caution, is not receivable in evidence against him, is *Regina v. Berriman*, 8 Cox C. C. 388. It is sufficient to observe that, in that case, as in *Regina v. Pettit*, the prisoner's statement, which was not allowed to be given in evidence against him, had been made in answer to questions put, *not* by a police constable, but by a magistrate ; and that *Berriman's Case* was decided after the passing of the 11 & 12 Vict. Accordingly it was held by Erle J. in *Berriman's Case*, as it has been held by Wilde C. J. in *Regina v. Pettit*, that, as the magistrate had no authority to put questions to the prisoner, the answer of the latter could not be received. This is obviously not an authority for the prisoner, but on the other hand it is in one respect an authority against him ; for it is there distinctly laid down by Erle J. that where there is evidence that a crime has been committed, a police constable is empowered to question a suspected person, in order to obtain information calculated to lead to the detection of the criminal.

Before leaving this branch of the discussion, I must say a word as to what has been urged strenuously on behalf of the prisoner. I mean the observation reported to have been made by Lord Campbell in *Baldry's Case*, to the effect that whereas by the law of Scotland a prisoner may be examined *personally* in reference to the offence with which he stands charged, by the law of England *that* cannot be done. This dictum of Lord Campbell has been relied on at the bar, as an announcement by that very eminent judge, that by the law of England a prisoner cannot be questioned by a police constable on the subject of the offence charged against him. But can such a construction be put upon Lord Campbell's observation ? In the first place it was not a judicial decision in any sense ; there was no question to be decided in *Baldry's Case* in reference to that matter at all ; and in point of fact no questioning of a prisoner by a police constable, or any other person, had taken place in that case. Then how came the observation to be made by Lord Campbell, and what was its real import ? What occurred was

this ; in the progress of the argument at the bar in Baldry's Case, the prisoner's counsel had mentioned Pettit's Case, where Wilde C. J. had rejected a statement made by a prisoner in answer to a question put to him by a magistrate, whereupon Lord Campbell observed that, however that might be in Scotland, by the law of England it could not be done. But what could not be done ? *not* that by the law of England a police constable was not at liberty to question a prisoner ; but that what was attempted by the Crown in Pettit's Case, namely, giving in evidence against a prisoner a statement made by him in answer to questions put to him by a magistrate, could not be done, the 11 & 12 Vict. having deprived the magistrate of the power of questioning the prisoner. So understood, the observation of Lord Campbell is distinctly in affirmance of the ruling of Wilde C. J. in Pettit's Case, as well as of Erle J. in *Regina v. Berriman*. But upon what principle can it be supposed that the Chief Justice of England, the head of the Supreme Criminal Court of the Kingdom, was ignorant of the fact of the Judges of England having pronounced over and over again that it was not contrary to law for a policeman to interrogate a prisoner touching the offence charged against him, or that Lord Campbell meant to announce that such a practice was contrary to law ?

PIGOT C. B. I consider the question now before us as arising, for the first time, for the decision of a Criminal Court of Appeal.

As to Wild's Case, 1 Moody C. C. 452, it was not argued by counsel. The reasons of the judgment are not given ; and we can learn the point determined only by referring to the facts of the case as they appear in the report. The evidence comprised two portions, distinct in their character. The first consisted of parol statements, made, on two successive days, to persons who asked the prisoner (a young boy) questions respecting the transaction of the alleged crime. He was not in the custody of a constable ; and none of the persons who spoke to him was a magistrate or a peace-officer. The second portion of the evidence was the prisoner's examination, taken of course before a magistrate, after a caution given to the prisoner. The very first sentence of that examination referred to what the prisoner had previously stated ; and may therefore be considered as incorporating, by that reference, his former statement in his examination before the magistrate, taken

down of course by the magistrate in writing, under the act of parliament then in force. The examination began with these words : " I can give no other account than I have already given." And then the prisoner proceeded to state nearly to the effect of what he had before told the persons to whom he had made the former disclosures. If the former statements were thus incorporated in the prisoner's examination, the whole evidence was, what the Judges held it to be, " in strictness admissible." If the previous disclosures were improperly elicited by the questions which were asked of the prisoner when he was under restraint (though not in custody of a constable), the Judges would most properly have " much disapproved of the mode in which " the confession was obtained. And accordingly they did express such disapprobation ; and the prisoner, who was convicted of murder, was not executed.

As to the case of *Rex v. Gibney*, *Jebb* C. C. 15, questions were certainly asked by the witness Lennon ; and Lennon in his evidence stated that he asked the prisoner, " Did you kill the child ? " and that the prisoner then said he did so, and stated the circumstances. But it appeared, upon the testimony of another witness for the prosecution, Arthur Foster, that, after conversing with the former witness, Lennon, about the child, " and upon both the witnesses again expressing themselves on the subject of its death, the prisoner said his conscience would not let him conceal it any longer ; and *he then confessed*." It therefore appeared, when the explanation which Foster's evidence furnished of the evidence of Lennon, that the disclosures of the prisoner were not in reply to the questions which were put to him, but were, according to his own statement, the result of the impulse of his own conscience. There was, upon the entire evidence, that which may have satisfied the Judges in the consideration of the circumstances of that case, that the confession was not to be treated as elicited by the questions ; and that it was, upon the admission of the prisoner, a purely voluntary confession. Whether they were right or wrong in that interpretation of the prisoner's avowal, if their decision was influenced by that view of the facts before them, it is not a decision upon the point now before us. Some of the learned Judges had at first doubts ; but they ultimately treated the confession as a voluntary confession. On account of the extraordinary circumstances of the case, however, the prisoner was recommended to mercy ; and he was not executed.

It is singular that, in each of those two cases which are now relied on in support of the admissibility of the evidence, the one in England and the other in Ireland, and in which the evidence came under the consideration of the Judges, the Judges were dissatisfied with the result ; and the extreme sentence of the law was not executed.

With respect to the case of *Rex v. Gibney*, I think there is the strongest reason to believe that the point now before us was not at all intended to be determined by the Judges. Both Lord Chief Justice Bushe and Mr. Justice Burton were among the Judges who considered that case. The Lord Chief Justice was appointed to his office in February 1822. The case of *Rex v. Gibney* was brought under consideration at a meeting of the Judges, at which he must have presided, in the following November 1822. The case therefore was one of the earliest of this class which occurred in the discharge of his judicial functions, and was not likely to be forgotten by him. Mr. Justice Burton, who was then less than two years upon the Bench, was also one of the Judges ; and yet both these eminent Judges afterwards held that evidence of this nature ought not to be received. *Regina v. Doyle*, 1 Crawford & Dix C. C. 396. *Regina v. Devlin*, 2 Crawford & Dix C. C. 151. In the former case, the police constable, who visited the prisoner in jail, and put to her there the question which was objected to, " cautioned her against saying any thing that might criminate herself, or be used for the purpose of convicting her ; " yet, notwithstanding that caution, the lord chief justice ruled that the answer to the question should not be given in evidence upon her trial. It has been suggested that Lord Chief Justice Bushe and Mr. Justice Burton must have forgotten the decision in *Rex v. Gibney*, where they ruled as they did in *Regina v. Doyle* and in *Regina v. Devlin*. In my opinion, it is to be presumed that they so ruled because they knew that the contrary had *not* been decided in *Rex v. Gibney*. If the point were an isolated matter, of rare occurrence, some such inadvertence might have been possible ; but not in one of constant recurrence (as the experience of us all can testify) in criminal trials, in the vast majority of which the prisoner was arrested by the constabulary, who certainly are not less prone to question prisoners than constables in England.

In *Rex v. Thornton*, 1 Moody C. C. 127, a lad of fourteen years of age had been apprehended without a warrant, kept without food,

and not brought before the magistrates until a late hour. In the course of the evening, a police officer, who had ordered the prisoner to Bridewell of his own authority, told him that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt that he, the prisoner, had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The officer replied that he would not have told so many falsehoods as he had if he had not been concerned in it; and again asked him if anybody had induced him to do it. The prisoner then began to cry, and made a full confession. The question considered by the Judges was, "whether a confession so obtained, where the detention of the prisoner was *perhaps illegal*, and where the conduct of the officer was calculated to intimidate, was admissible in evidence?" Seven of the Judges held that the evidence was admissible, on the ground that no threat or promise had been used. Three of the Judges (Best C. J., Bayley J. and Holroyd J.) were of a contrary opinion. The case was not argued by counsel. The reasons of the Judges (as very constantly happened in the notes of the points reserved prior to the establishment of the Court of Criminal Appeal) are not given; and the *point was not reserved* in reference to the effect of the eliciting of evidence by the questioning of the prisoner. Undoubtedly, the resolution of a majority of the Judges upon a question so reserved according to the former practice, was and is entitled to the greatest respect. It ought to be followed by individual Judges, *upon the point determined*, though determined in that form,—the only form in which questions of evidence, in cases of felony, could practically have been submitted to an Appellate Tribunal before the institution of the Court of Criminal Appeal. But the very circumstance that the Judges, in considering points reserved in criminal cases, did not usually sit as an open court of law, hearing the questions argued with the assistance of counsel, and delivering their judgments, with their reasons, in the face of the profession and the public, constituted an objection to such a tribunal, which deprived it of much of the authority that would have otherwise attached to it, and led to the substitution of that tribunal which, in this country, we now compose. I have always thought that there was great force in the observation made by the late Mr. Justice Jebb, where a decision of the majority of the Judges upon a point

reserved on a civil bill appeal, was cited to him. Such a decision was exactly analogous to that of the Judges determining upon a point reserved at a criminal trial. In neither case was it the decision of a regularly constituted tribunal. In both cases, the resolution was often adopted without the hearing of counsel. In both, the Judges determined, in Chamber, without assigning their reason. In the course of the argument in *Rankin v. Newsom*, 1 Hudson & Brooke, at p. 77, the case of *Hogan v. Fitzgerald* was cited, — a case decided before the twelve Judges, in which it was held that a reversion was not necessary to enable a plaintiff to maintain a civil bill ejectment for non-payment of rent, under the 56 Geo. III. ch. 88. Mr. Justice Jebb said: “With respect to that decision, there certainly was a difference of opinion among the Judges. It was not argued by counsel; and I have no hesitation in saying that I do not consider myself bound by it.”

It is undeniable that there has been, in reference to the admissibility of this kind of evidence, diversity of practice among Judges. The great preponderance of authority, in this country, has been against its reception. Among those who entertained and acted upon that opinion have been Judges as stern and determined in their resolution to repress crime, as any that have ever administered the criminal law in modern times. Among those whose opinions against the reception of the evidence have been reported in our books, we find Lord Chief Justice Bushe, *Regina v. Doyle*, 1 Crawford & Dix C. C. 396; Lord Chief Justice Doherty, *Regina v. Hughes*, 1 Crawford & Dix C. C. 13; Mr. Justice Burton (after consulting with Lord Chief Baron Brady) *Regina v. Devlin*, 2 Crawford & Dix C. C. 151. In *Regina v. Hasset*, 8 Cox C. C. 511, Mr. Justice Christian did not determine the point; but the evidence being offered, and my brother Christian having expressed his disapprobation of the practice, and intimated his opinion that the Crown ought not to press the evidence, it was withdrawn. In *Regina v. Gray* mentioned in the note in 7 Cox C. C. p. 246, and in Mr. Levinge’s book on the Duties of Justices of the Peace p. 56, (a book which, in passing, I may say, appears to me to have been prepared with much care and ability) such evidence was rejected by my lord chief justice. In *Regina v. Toole*, 7 Cox C. C. 244 tried before myself and Baron Richards, we did not decide the abstract point; but the evidence was certainly offered and rejected. There is no reported case of any decision of Mr. Justice Perrin upon this



point, during his long judicial career. But I can testify, both from having, for several years, acted before him as prosecuting counsel for the Crown, when he went the Munster circuit, and from having sat with him repeatedly at the Commission in Dublin, that that most learned and able judge—and a higher authority I could not cite on criminal and constitutional law—invariably rejected this species of evidence. His view was,—long before a view precisely similar was, in similar terms, expressed by Lord Truro in *Regina v. Pettit*, 4 Cox C. C. 164, 165,—that, to obtain admissions by interrogatories put to a prisoner in vinculis, was a species of torture, that it savored of the character of the Inquisition, as it once prevailed in some continental countries, and was abhorrent to the principles and spirit of the English law. Against this weight of judicial authority in Ireland there is but one reported decision in favor of the admissibility of such evidence, that of Mr. Justice Crampton in *Regina v. Francis Hughes*, cited from manuscript note in Joy upon the Admissibility of Confessions, and Challenges to Jurors, p. 39.

In England the evidence of statements of prisoners elicited by questions put by constables and others, has been received in several reported cases, generally with strong expressions of the Judges in condemnation of the practice. I apprehend however that such is not the practice of all the English Judges. Lord Chief Justice Doherty, in *Regina v. Hughes*, 1 Crawford & Dix C. C. 15, states that he was himself present when views, similar to those which he expressed in that case, were enunciated from the Bench in England. And in a case, of which the report has been published since the case now before us was argued, *Regina v. Mick*, 3 Foster & Finlason, 822, Mr. Justice Mellor, though he held that the evidence was admissible, expressed, in strong language, his condemnation of the practice; declaring that “*many Judges would not receive such evidence.*” Such being the state of the authorities in both countries, it appears to me to be our duty, as a Court of Criminal Appeal, to consider this question with reference to the principles on which, if it were now *res nova*, it ought to be determined. The question itself I regard as of the very greatest importance, with a view not only to the purity and impartiality at which our jurisprudence aims in administering the criminal law, but to the dignity and credit of the administration of that law in those countries.

Let me premise that we have not here to determine whether,

and how far, a constable or a private person may question one who is suspected of crime, respecting matters which it may be proper to learn, in order to determine whether the party ought or ought not to be arrested and brought before a magistrate for further inquiry. Mr. Justice Erle, in condemning the practice of questioning for the purpose of establishing the guilt of a suspected person, distinguishes that course from such inquiries as may reasonably be made with a view to determine whether there are proper grounds for apprehending the party. *Regina v. Berriman*, 6 Cox C. C. 389. Even for the latter purpose he says, that such a course ought to be very sparingly resorted to. As to the former he says: "I wish it to go forth among the inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law." It may be a proper inquiry that a policeman, who sees a person in possession of goods under suspicious circumstances, should ask him what are the goods, and where he has received them. If such goods have been recently stolen, one of the facts on which an inference of guilt may be drawn by a jury is the inability of the possessor, on reasonable inquiry, to account for the possession of the recently stolen goods. It is essential, for the protection of the suspected person, to give *him* the opportunity of accounting for the possession of the goods. It is essential for the purpose of determining whether he shall be prosecuted, to ascertain whether he does or does not give a reasonable account of the stolen property found in his possession. The law allows the jury to draw the inference of guilt from the inability of the person with whom stolen property is found, under such circumstances, to account for the possession of it; therefore the inquiry may, and I think ought to, be made; but this is a perfectly distinct matter from that with which we are here dealing. It is one question whether such an inquiry, so limited, may lawfully be made with a view to determine whether there are reasonable grounds for arresting a party who is suspected; it is another and a wholly different question, whether answers elicited by interrogations put with a view to establish the guilt of a prisoner in custody, and thus to make him, while a prisoner, his own accuser, shall be afterwards received in evidence against him upon his trial. The principle by which the criminal tribunals have been always governed, in admitting or rejecting statements of prisoners criminatory of themselves, has been that, in order to make evidence of such statements admissi-

ble, it must be shown to the satisfaction of the judge that the statements have been purely *voluntary statements* of the prisoner, and the statement must not be elicited by temporal hope or fear caused in the prisoner's mind by a person having authority ; and there is high legal authority for holding that the prosecutor is bound to satisfy the judge, affirmatively, of the absence of any such inducement resulting from hope or fear so caused, before evidence of a confession shall be received. *Regina v. Warrington*, from the manuscript note of Baron Parke.

In considering whether statements made by a prisoner, in answer to questions put by the officer of the law in whose custody he is when questioned, are voluntary statements, we must have regard not only to the relative position in which they stood towards each other, but also to the ordinary infirmities of mankind, especially those which are likely to exist among the ignorant and uneducated in the lower classes of society. The danger to be guarded against is not, in the far greatest number of cases, that an innocent man will fabricate a statement of his own guilt, although instances of this have occurred, too well attested to be doubted ; the danger is, that an innocent person suddenly arrested, and questioned by one having the power to detain or set free, will — when subjected to interrogatories which *may* be administered in the mildest or *may* be administered in the harshest way, and to persons of the strongest and boldest, or of the most feeble and nervous natures — make statements not consistent with truth, in order to escape from the pressure of the moment. A prisoner so circumstanced may not hear, in terms, one word of hope held out or of mischief threatened ; and yet he may, and in many cases must, be actuated by hope that his answers will lead to his liberation, or fear that his answers may cause his detention in custody. He is placed in immediate contact with one who for the time is his jailer, for the most part with no third person present to witness what passes, and almost always without the presence of any person to whom he can appeal for protection, or who may control the examination within fair or reasonable bounds. Manner may menace and cause fear as much as words. Manner may insinuate hope as much as verbal assurances. The very act of questioning is in itself an indication that the questioner will or may liberate the answerer if the answers are satisfactory, and detain him if they are not.

When a constable cautions his prisoner that he is not bound to

say any thing to criminate himself, but that what he shall say may be used in evidence against him on his trial, then, if the constable says nothing for the purpose of eliciting a disclosure, the prisoner is left to the voluntary agency of his own mind. But if the constable puts a series of searching interrogatories, he virtually, and, I think, actually and in effect, abandons the caution, and announces, by the very course of interrogation which he applies, that it is better for the prisoner to answer than to be silent. The process of question impresses, on the greater part of mankind, the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency; and impels him to answer, from the fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed to the strict truth, become, on a severe or artful cross-examination, involved in contradictions and excuses, destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character, under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it. This relative position of the parties does not therefore tend to truth, as the result of the inquiry. It does tend, in the strongest way, to make the statement of the prisoner the reverse of voluntary; and cause a necessary tendency to make the answers of the prisoner the result of the promptings of fear or hope, or both, operating upon his mind. It was upon this ground that, while the acts of 1 Philip & Mary, ch. 13, and 2 & 3 Philip & Mary, ch. 10, were in force in England, Lord Chief Baron Richards in *Rex v. Wilson*, Holt N. P. C. 597, held that an examination of a prisoner, taken down by a magistrate, but elicited by interrogatories, should not be received in evidence against him on his trial. While those statutes, and that of the 7 Geo. IV. ch. 64 (which, in substance, extended to misdemeanors, the provisions of the former statute applicable only to felony), were in force, Mr. Justice Holroyd, according to a note in 2 Starkie on Evidence, p. 39, admitted an examination under similar circumstances to those under which it was rejected by Lord Chief Baron Richards; and in *Rex v. Ellis, Ryan & Moody* N. P. C. 432, Mr. Justice Littledale expressed an opinion in accordance with that of Mr. Justice Holroyd; although at his suggestion, the

case was not pressed by the Crown, and the prisoner was acquitted. It seems probable that the views of those Judges who admitted the statements, although elicited by the questions of the magistrate, were influenced by the word "examination," which is used in the statutes of Philip and Mary, and of the 7 Geo. IV. ch. 64, in describing the written statement of the prisoner; and it was plainly to correct this, and to place the duty of the magistrate, in dealing with the prisoner, upon grounds clear and defined, that the legislature, in repealing the former statutes, and in prescribing the procedure to be applied when prisoners are brought before magistrates, charged with indictable offences, omitted the word "examination," and introduced the word "statement," into the English statute 11 & 12 Vict. ch. 42 § 18, and into the Irish statute 14 & 15 Vict. ch. 93 § 14, subdivision, 2. In both these acts of parliament, which now regulate the procedure before magistrates, the legislation is such as to preclude the magistrate from interrogating the prisoner. This was so ruled by Lord Chief Justice Erle (then Mr. Justice Erle) in *Regina v. Berriman*, 6 Cox C. C. 388, and had been previously determined by Lord Truro, when Lord Chief Justice of the Common Pleas, in the case of *Regina v. Pettit*, in terms which disclose a principle so applicable to the case now before us that I shall state them here. "I think I ought not to receive this evidence; and I reject it upon the general ground that magistrates have no right to put questions to a prisoner with reference to any matter having a bearing upon the charge upon which he is brought before them. The law is so extremely cautious in guarding against any thing like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A person in custody or other imprisonment, questioned by a magistrate, who has power to commit him and power to release him, might think himself bound to answer, for fear of being sent to jail. The mind, in such a case, would be likely to be affected by the very influences which render the statements of accused persons inadmissible." 4 Cox C. C. 165.

In my judgment, the relative positions of the constable who has custody of the prisoner and of the prisoner who is in custody of the constable, negatives the fact that the prisoner is a free agent. It rebuts any presumption that the prisoner's statement is voluntary, and furnishes the strongest presumption that it is not. It is cal-

culated to cause the answers elicited by interrogatories to be influenced by hope and fear ; and, upon the principle on which evidence of confessions has been hitherto rejected, when influenced by either of these motives, I am of opinion that the evidence in the present case ought not to have been received.

MONAHAN C. J. The cases bearing on the question now before us have been so fully and accurately referred to by several members of the court who have preceded me, that I do not consider it necessary to go through them in detail, or attempt to reconcile what is absolutely irreconcilable ; neither is it an easy task to deduce from them any certain principle applicable to the present case. No doubt, *primâ facie*, any statement made by a party is evidence against him in any proceedings, civil or criminal ; and it is now clearly settled, by the highest authority, that the fact of a confession having been made by a prisoner in custody, to a constable in whose custody he is, does not necessarily render the confession inadmissible. That is clearly established by *Baldry's Case*. In that case it was assumed that the admissibility or non-admissibility of the evidence depended on the fact whether the constable held out to the prisoner the promise or assurance of any worldly advantage in regard to the charge, as the consequence of making a statement, or the threat of harm, as the consequence of refraining from doing so ; and accordingly in that case the constable, having stated to the prisoner he was charged with administering poison to his wife, told him he need not say any thing to criminate himself ; what he did say would be taken down, and used in evidence against him. The case was argued at very great length ; cases referred to in which Judges held that telling a prisoner what he said would be used for or against him, was holding out an inducement to make a statement, and therefore the evidence was rejected. These cases were however overruled by the Court of Criminal Appeal ; and that court held that what the constable said to the prisoner did not amount either to a promise or a threat, and that the evidence was properly received ; and the conviction affirmed.

In the present case the facts are : The prisoner, having been suspected of shoplifting in the city of Dublin, two police constables were directed to watch her movements ; but no warrant had been issued for her arrest. The constables either accompanied or followed her from Dublin to Kingstown, by railway ; and saw her, on

two occasions, in the shop of Mr. Hutchings, a boot and shoemaker. They returned in the same carriage with her from Kingstown to Dublin, not being aware that any theft had been committed in Kingstown. When they arrived in Dublin, the police perceived a small parcel with her, and told her who they were; that she was described to them as having stolen boots in Dublin; that she was charged with felony. They did not tell her she was in custody, but stated, in answer to the judge, they would not have let her go. The constable asked her what she had in the parcel. She said, "two pair of boots." Witness then took the parcel out of her hand. They were four odd boots; and witness asked her where she got them. She said "she was made a present of them in Kingstown." Witness told her he saw her in Mr. Hutchings's shop in Kingstown, and asked her "was it there she got them?" She said "yes; that she took them out of that." The witness then, for the first time, told her she was not bound to say any thing to criminate herself; and that they would arrest her, and bring her to the barracks.

Now, the first objection made to the statement of the prisoner is, that the police constable did not give her the usual caution, that she was not bound to say any thing to criminate herself. Stripp's Case, Dearsly C. C. 649, decides that what a prisoner states, in a proceeding before a magistrate, is evidence against him, though not preceded by a caution. The facts in that case were: The prisoner was brought before a magistrate, by a constable, who applied for a remand, to make further searches and inquiries; and, in the course of the application for the remand, the constable stated that he believed it was with a chisel the prisoner had opened the cash-box which he produced. The prisoner interrupted him, and said it was not with a chisel, but with a hammer he had opened it. The question was, whether this admission was receivable in evidence. Jervis, C. J., giving the judgment of the court, says: "The 18th section of the 11 & 12 Vict. ch. 42, applies only to the concluding examination before the committing magistrate, after all the witnesses have been examined, and does not apply to a voluntary statement made by a prisoner in the course of the examination, and before the conclusion of the case for the prosecution. Such a statement is admissible; and it is immaterial whether made before, during, or after a remand." Therefore, I should say, the mere absence of the caution does not render the evidence inadmissible.

But the question which has been principally argued (and in fact is the foundation of the judgment of my lord chief Baron and my brother O'Brien) is, that the admission of the prisoner is in answer to questions asked by the constable; and this really is the difficulty in the case. Does the asking of these questions—"What have you got there?" "Where did you get them?" "I saw you in Mr. Hutchings's shop; was it there you got them?"—hold out any hope of benefit to the prisoner by answering them, or any threat of injury by refusing to do so? When the constable asked these questions, no charge in relation to the boots in question had been made. The owner of the goods was not aware they had been stolen, nor was the constable. It was the suspicious appearance of the parcel, and previous information in relation to the prisoner, that induced the constable to suspect her. I cannot say the case is free from difficulty; but, after giving the matter the most full consideration in my power, I have come to the conclusion that the mere asking of these questions is not, per se, calculated to convey to the prisoner either hope of benefit or threat of injury, from making a statement one way or the other; and therefore are not, on that ground, objectionable.

But it has been argued that, though nothing has been said or done by the constable which can be construed into an inducement or a threat, still that a person in custody of a constable, or who, without being in custody, is asked about property found in his possession, may, not unnaturally, be under the impression that it is for his advantage to make a statement in answer to the question so asked. This certainly may be so; yet still I am not aware that an answer, not amounting to a confession of guilt, has been, in a case like the present, rejected in evidence, as in the present case. Could the answer of the prisoner, that "she had been made a present of them in Kingstown," be objected to? I know that in practice, in several cases, such evidence has been constantly received; and the false account of the property given by the prisoner the principal ground of his conviction. If then the first question and answer are not objectionable, it seems difficult to say that the other question "was it in Mr. Hutchings's you got them? I saw you there," is objectionable.

The recent reported English case, most strongly relied on by the prisoner's counsel, is that before Chief Justice Wilde, *Regina v. Pettit*, 4 Cox C. C. 164; and which, to say the least of it, is not



disapproved of by Lord Campbell in Baldry's Case, to which I have already referred. In that case, a man having been shot about nine o'clock in the evening, the prisoner was arrested in a few hours afterwards, and brought before the magistrates who assembled for the purpose, and was asked certain questions by the magistrates. The report does not state what the questions or answers were. Chief Justice Wilde rejected the evidence, saying: "I think I ought not to receive this evidence; and I reject it on the general ground that magistrates have no right to put questions to a prisoner with reference to any matter having a bearing on the charge upon which he is brought before them. The law is so extremely cautious in guarding against any thing like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A prisoner in custody or other imprisonment, questioned by a magistrate who has power to commit him and power to release him, might think himself bound to answer for fear of being sent to jail; the mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible." The evidence was therefore rejected, and the prisoner acquitted. In Baldry's Case, where this case was referred to by the counsel for the prisoner, Lord Campbell's observation is: "Prisoners are not to be interrogated; by the law of Scotland they may be; but by the law of England they cannot." I shall not now stop to consider whether, if Pettit's Case comes to be reviewed in the Court of Criminal Appeal, it is likely to be affirmed. I do not think that question arises in the present case. This is not the case of a prisoner brought before a magistrate on a specific charge, and interrogated by him in relation to that charge; nor is it the case of a party arrested by a constable under a warrant on a specific charge, and interrogated by him in relation to that charge, in both of which cases the magistrate and constable do what they have no authority or necessity for doing; but, in the case before the court, a constable finds a party, under suspicious circumstances, in possession of property, which he has grounds to suspect as being stolen. I do not doubt but that under such circumstances the constable is justified in making inquiries in relation to the property, in order to determine whether he shall arrest the party or not. Even though this inquiry is continued beyond the point when the constable de-

termines in his own mind to arrest the party, I cannot consider that the questions so asked, or the answers given, come within the reason of the rule laid down by Chief Justice Wilde, whether these answers be a denial or confession of the previous guilt.

On the whole therefore I am of opinion that there is nothing in this case to show that the prisoner's statement was the result of hopes held out or injury threatened; and that it does not come within the rule laid down by Chief Justice Wilde; and therefore that the evidence was properly received, and that the conviction should be affirmed.

LEFROY C. J. The question in this case is, whether the confession of the prisoner, made to a policeman, as reported to us by the learned Judges who tried the case, was admissible in evidence, — that is, was it admissible under all the circumstances under which that statement, or what is called a confession here, was made? We are all agreed that, to render it admissible, it must have been made freely and voluntarily; and that it is for those who bring forward the evidence to show that it was so made. This is put beyond any doubt by the case of *The Queen v. Baldry*, where it was decided that, unless the judge is satisfied that the confession is made freely and voluntarily he should not let the evidence go to the jury. Whether the confession be true or not, is for the jury; but the question whether it has been made freely and voluntarily is for the presiding Judge, and for him alone.

In looking through the long list of cases decided before the constitution of the Court of Criminal Appeal, we find that the decisions of individual Judges furnish a mass of varying and somewhat contradictory authority; we find, under the very same circumstances, decisions directly contradictory; nor is it wonderful that this should be the case, until a tribunal was established for the purpose of reviewing all these cases, and, as far as possible, extracting from them some principle common to all. That is, as I conceive, the great object of this Court of Criminal Appeal; namely, to extract from the decisions which have taken place some clear and common principle, which may guide magistrates and policemen in the regulation of their conduct in proceedings of this nature. This appears to have been already attained, to a certain extent; for the rule is clearly established that, wherever a confession is obtained by means

of any inducement, or by any hope of advantage, or by holding out any threat, there the confession cannot be received. But the converse of that proposition has not been established; and it is most important to look at the case in this respect, and to see whether, although there has been no inducement, no promise of advantage, and no threat, the confession is receivable in evidence. Hitherto the only question that has been raised in such cases is, whether there has been such inducement or threat; and not whether the confession has been made freely and voluntarily. The criterion derived from the absence of threat or inducement is, in my opinion, but a particular instance of a general rule, and not the rule itself. The great inquiry in all such cases must be, whether the confession was made under circumstances which show that it was made freely and voluntarily; and the great mistake that has been made is, that the inquiry has been, not whether the confession was made freely and voluntarily, but whether it was made in the absence of any threat or inducement. It may have been made under circumstances showing that it was not made under the influence of any threat or inducement, and yet may not have been made freely and voluntarily. And what I lay my finger on in the present case, as showing the violation of this great principle of the law, is that the party was entrapped into making the confession by the course taken by the sergeant of police, in following up his examination of the prisoner.

The great principle is laid down by Hawkins, in these words: "The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins P. C. ch. 46 § 3, note 4, p. 604, 2d ed.

The great principle therefore upon which Hawkins states that a confession, obtained either by inducement or threat, is not admissible in evidence, is, that "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." I think these last words are most essential; for they show the reason why

the existence of either hope or threat will oust the admission of the confession in evidence.

I shall presently come to consider the facts of this case, and to consider whether there is not ample evidence that the prisoner here has been the deluded instrument of her own conviction; and if that be the result of the evidence, according to this authority, which is the highest we have in the law, for it is laid down on the authority of Lord Hale, the conviction in this case cannot be sustained. But there is another authority which it appears to me also most important to refer to, — it is the judgment of Lord Denman in *The Queen v. Arnold*, 8 Carrington & Payne, 621 decided in the year 1838. In summing up in that case, his lordship says: “The frequent warnings given to prisoners not to say any thing that may criminate themselves, render it necessary for me to set right a prevalent error on this subject, and to state what I conceive to be the proper course of proceeding. A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of magistrates to record it; but magistrates, before they do so, ought entirely to get rid of any impression that may have before been on the prisoner’s mind, that the statement may be used for his own benefit; and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. There are two things important to be considered and observed, the prisoner must not be entrapped into making a confession or statement; but if he does make it, it is right that he should be cautioned in the first instance, and should be told that he need not make any statement; but if he is willing to make a statement, he has a right to do so; and the magistrate should then give him a caution that what he says will be taken down in writing, and may be used against him on his trial.” It is all important to observe that this judgment was previous to the passing of the act for regulating the proceedings before magistrates in criminal cases (11 & 12 Vict. ch. 42) and that Lord Denman then stated it to be the duty of the magistrate to give the prisoner a caution, first, to see that he is not entrapped, and next, to show him that whatever he may say will be taken down in writing, and may be used against him. Here, then, is what Lord Denman represents to be the law before the late act of parliament was passed. Is it possible that, if a magistrate was bound, as the law then stood, to guard the prisoner against being

entrapped, a police constable could be allowed to put questions to a prisoner upon any other terms? What was stated to be then the law in respect of the duties of magistrates, is precisely that which, by the act of parliament, is pointed out; and therefore, as has been observed, this act of parliament was passed to give legislative effect to the statement of the chief justice. But it is said that, although the legislature have passed a law obliging magistrates to adopt this course, and to continue that which was the proper practice at the time of the passing of the act, it has not interfered with the practice adopted by police constables. But, I would ask, what inherent right have the police to ask a prisoner to make statements, or to put questions, if the act did not give it to them? And, if a magistrate could not obtain a statement from a prisoner without a previous caution, is it possible to imagine that the police could have any such privilege? We have heard no authority for any thing of the kind. When the police are made aware that a felony has been committed, they merely take measures to arrest the felon; and, to justify themselves in arresting him, it may be necessary to ask questions; but does it follow that, because they are at liberty to ask questions which may be necessary under the circumstances, they should be privileged to give in evidence the answers they may receive to those questions, given without any previous caution? for, in the case before us, it is remarkable that the caution was not given until the answers were obtained. I shall have occasion to advert to that matter more particularly hereafter; but I refer to it now to show that the police in fact claim a privilege beyond what the magistrates have or had previous to the statute, and with regard to which they are, since the statute, specially limited by an express negative provision. It seems to me impossible therefore, looking either to the common law or the statute, when we consider the right of the subject not to be made the instrument of his own conviction, to say that he is to be deprived of that right by the questioning of a police constable.

Hitherto, the question argued has been, not whether the statement was made freely and voluntarily, but whether it was made under the inducement of hope or fear. That is not the real question. The existence of such an inducement is an admitted ground for the exclusion of the evidence; but is it the only ground of exclusion? In the present case, a confession and statement has been made, under circumstances demonstrative of its not having

been freely and voluntarily made. I have taken down the dialogue exactly as it occurred, and as it has been reported to us by the learned judge who tried the case. The constable said to the prisoner: "We belong to the police." This statement was all right and proper; it apprised the prisoner who the persons were who were addressing her; and, at the same time, it apprised her that they were persons who had power to take her to the police office on a charge, if they thought fit. The policeman went on and said: "You have been described to us as having stolen boots from a shop in the city." She therefore had been described to them as having committed a felony, and was in fact charged with having stolen goods in her possession. He then asked her: "What have you got in the parcel?" The policeman states that at this time they would not have let the prisoner go; but they did not tell her so; they gave her no caution; but, on the other hand, they held out no inducement. The prisoner said: "I have two pairs of boots in it." The policeman then took the parcel from her, and asked her where she got them. She said: "I was made a present of them in Kingstown." The constable next said: "I saw you in Mr. Hutchings's shop in Kingstown; was it there you got them?" To which she replied: "Yes; I took them out of that." The constable then, after that answer, told her she was not bound to say any thing that might criminate her. Now, here we have a regular cross-examination of the prisoner, by which she is brought into this dilemma,—either she should convict herself of having told a falsehood, in having said she was made a present of them; or she must confess the crime. Is not this what Lord Denman calls "entrapping a prisoner?" or is it not what Hawkins terms "making her the deluded instrument of her own conviction?" And if it be necessary that a prisoner's statement should be made freely and voluntarily, in order to make it admissible in evidence, is it to be held that this statement can be admitted in evidence, obtained, as it was, by a course of proceeding which, though it held out no threat or inducement, was yet but an ingenious stratagem, which had the effect of making her the deluded instrument of her own conviction? If this be not within the objection made by Hawkins and Lord Denman to "entrapping the prisoner into a difficulty," I do not know what is; and it also appears to come within that further objection laid down by Lord Denman that, when a prisoner makes a statement, there should be a previous caution, and that he should

be told that what he says, if he chooses to say any thing, will be taken down, and may be used against him at his trial.

If, then, the true principle be that, in order to make the statement of the prisoner legal evidence on his trial, it must appear clearly to the judge who tries the case that the statement was made freely and voluntarily (and according to the case of *The Queen v. Baldry*, it is not sufficient unless this requirement be satisfied) is there any ground, in the present instance, for saying that the judge who tried the case was satisfied that the statement was made freely and voluntarily? I do not think there is.

Upon these grounds, it appears to me that the evidence in question should not have been admitted; and that, it having been admitted, the conviction is wrong, and should be quashed.

The majority of the Court being of opinion that the conviction should be affirmed, *Per Curiam — Conviction affirmed.*

It is a frequent subject of discussion, under what circumstances the confession of a prisoner is admissible in evidence. The opinions of individual Judges, as reported in the *Nisi Prius* Reports, are conflicting; and the summary of the law in the text-books is too brief to be satisfactory, and is often inconsistent, from a neglect to analyze minute distinctions in the facts of the several cases.

It may be said of this subject, as it is by a late learned writer and eminent judge on another point of evidence in criminal cases, "If it be important, and none can doubt that it is so, that this testimony should be received, it is important that the rules which govern its reception, should be rightly understood. Yet there is hardly any question in the law upon which a greater diversity of opinion prevails. This is the more surprising, as the inquiry presents no peculiar difficulty. There is no intricate problem to be solved, no recondite principle to be explored or extracted." Chief Baron Joy, on the Evidence of Accomplices.

The subject has been, in some degree, perplexed by a practice that has grown up of citing the dicta of Judges upon circuit, without reference to their agreement or disagreement with decided cases, and their decisions are given in the text-books, in a form so condensed, and the facts upon which they are founded are so sparingly detailed, that it seems often unfair to the Judges who pronounced them, to press them upon the court as authorities. It was remarked by Lord Manners, that "It is always unsatisfactory to abstract the reasoning of the court from the facts to which that reasoning is meant to apply. It has a tendency only to misrepresent one judge, and to mislead another." *Revell v. Hussey*, 2 Ball & Beatty, 286.

It is endeavored, in the following pages, to abstain, as far as possible, from giving the opinions of Judges irrespectively of the precise facts on which they are grounded, and of decisions which have been made upon the same points; and the object in citing so many *nisi prius* cases, is not to claim authority for any case per se, but to compare them one with another, and with decisions of the courts above,

and with resolutions at the meetings of the Judges on points reserved, and thereby to ascertain how far they are to be considered as law, and how far they are inconsistent or inapplicable as precedents.

The reference to the dicta of Judges at *nisi prius*, as binding upon succeeding Judges, has been deprecated by very high authorities. When a dictum, even of Sir Matthew Hale, was cited to the Court of Common Pleas, when Lord Loughborough presided there, that learned judge said: "Although I entertain the highest respect for the authority and character of that great judge, yet it would be doing injustice to his memory to take every hasty expression of his at *nisi prius* as a serious and deliberate opinion." And on the same occasion, Mr. Justice Wilson remarked, that the passage cited was "a dictum, not a judicial opinion, of Sir Matthew Hale. Every one, who hears me, must acknowledge the impropriety of construing all the conversation which passes between the judge and counsel at *nisi prius*, as legal decision." 1 H. Blackstone, 53, 63.

So in a later case, when an opinion, expressed extra-judicially by Lord Kenyon, was cited in the King's Bench, Best J. said: "No man can entertain a higher respect for the memory of that noble and learned judge than I do, but *nisi prius* decisions, coming even from him, unless they have been acted upon by succeeding Judges, sitting in bank, are entitled to very little consideration." *Parton v. Williams*, 3 Barnewell & Alderson, 341, where the opinion of Lord Kenyon in *Postlethwaite v. Gibson*, 3 Espinasse N. P. C. 226, was cited. And in a subsequent case, the same learned judge, when chief justice of the Common Pleas, says, in reference to a case before Perrott B.: "It is not right to repeat opinions hastily formed, and delivered in the hurry of trial; and the practice of referring to them has occasioned all the confusion that the enemies of our law object to." *Johnson v. Lawson*, 2 Bingham, 90. It will not be found useless to bear these observations in mind in relation to the law on the admissibility of confessions in criminal cases.

Mr. Justice Chambre, in 1809, complained of "the obscurity and discordance of the cases" upon this subject; Russell & Ryan C. C. 154; and if the opinions of individual Judges, reported since that period, are taken into account, such obscurity and discordance may not seem much to have diminished. Under such circumstances it becomes necessary to weigh and compare authorities, adopting the principle of Grotius: *Sicut in facti quæstionibus, id pro vero habetur, unde plures maximeque idonei stant testes, ita sententiarum eas sequendas, quæ plurimis præstantissimisque nitantur auctoribus.*]

It will be found on examination, that the law on this important branch of evidence in criminal cases, as deduced from principle and supported by the weight of authority, is, in most instances, definite and clear.

The confession of a prisoner is in the nature of presumptive evidence. It is admitted in evidence upon the presumption, that a person will not make an untrue statement militating against his own interest. It is a question for the court, and not for the jury, to decide whether, under the particular circumstances of the case, the confession be admissible. In *Regina v. Garner*, 1 Denison C. C. 329, Erle J. said: "In every case it is for the judge to decide whether the words were used in such a manner, and under such circumstances, as to induce the prisoner to make a confession of guilt, whether such confession were true or no." "It is submitted," writes Mr. Greaves, "that it is a question for the jury whether they



believe the witness gives a true account of what the prisoner said, and also whether the prisoner made the statement voluntarily, or was prevailed upon to make it by any inducement used by the witness, although the witness may have denied that he used any inducement whatever. The editor has known these questions left to the jury on several occasions, and it is conceived that it is the proper course, as they alone are the judges of the credibility of the witnesses." 3 Russell on Crimes, 368 note. 4th ed.

It may be convenient to reduce the law upon this subject into a series of distinct propositions, and to show, by reference to decided cases, how they bear upon such propositions respectively.<sup>1</sup>

*SECTION I. A confession is not admissible in evidence where it is obtained by temporal inducement, by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, or where there is reason to presume, that such person appeared to the party to sanction such threat or inducement.*

The general rule was well stated by Merrick J. in *Commonwealth v. Tuckerman*, 10 Gray, 173, at pp. 190, 191: "It is certainly a clear as well as familiar principle of law, that every free and voluntary confession is admissible in evidence against a party accused of any criminal offence; but that all those which are obtained from him by threats of harm, or promises of favor and worldly advantage, held out by a person in authority, or standing in any relation from which the law will presume that his communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals. This is in conformity with the whole current of authorities on the subject." *Commonwealth v. Knapp*, 9 Pickering, 507, and 10 Pickering, 489. *Commonwealth v. Taylor*, 5 Cushing, 604. *Commonwealth v. Whittemore*, 11 Gray, 201. *Commonwealth v. Howe*, 2 Allen, 153. *Commonwealth v. Curtis*, 97 Massachusetts, 574, 578. *The State v. Bostick*, 4 Harrington, 563, 564. *The State v. Grant*, 22 Maine, 171.

"The ground," said Chief Justice Shaw, "on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced by the pressure of hope or fear, to admit facts unfavor-

<sup>1</sup> It has been suggested, as likely to make these pages practically more useful, that many of the cases should be cited at some length, and that the facts should be given, at least in substance, upon which the decision was made, and also the ground of the decision, as reported in the original cases, which are seldom accessible on circuit. Counsel citing a case, and the court may thus judge of the weight and application of the authority, which, from the summary and often abstract reference of the text-books, seems, in many instances, impossible, without referring to the cases themselves.

With the same object it is useful to refer, even at the hazard of repetition, more than once to the same case, where it bears, in its different parts, upon different points, as is so often done by Mr. Fearne, — no mean authority, — in his work on Remainders.

It is usually stated, where the Reports furnish information, whether the prisoner was acquitted or convicted, as, in the latter instance, when the judge has admitted a confession in evidence, and has not reserved a case for the Judges, it may generally be presumed that no doubt was entertained of its admissibility, and that it was not pressed by counsel as a case fit to be reserved.

able to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted. Of course, such inducement must be held out to the accused by some one who has, or who is supposed by the accused to have, some power or authority to assure to him the promised good, or cause or influence the threatened injury. The general rule of law seems sufficiently plain and clear, but the great variety of facts and circumstances, attending particular cases, renders the application difficult, and each case must depend much on its own circumstances." *Commonwealth v. Morey*, 1 Gray, 462, 463.

The master or mistress, or prosecutor of a prisoner, as well as a magistrate or constable, is considered a person in authority, so as to exclude a confession made under these circumstances. *The State v. Bostick*, 4 Harrington, 564.

Thus in *Rex v. Upchurch*, 1 Moody C. C. 465, a leading case, the prisoner, a girl of thirteen, was tried for attempting to set fire to the prosecutor's house. She was his servant. After the attempt was discovered, the prisoner came into her mistress's room in the absence of the prosecutor. Her mistress said to her: "Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if W. H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. Her mistress then said: "Pray tell me if you did it?" The prisoner confessed. It was contended on the part of the Crown, that the prosecutor's wife had no authority, real or apparent, over the prisoner, so as to hold out any hope that could influence her to make a false statement that her life might be spared, and, therefore, that the confession was admissible. Parke B. reserved the point. In Hilary term 1836 all the Judges present, Lord Denman C. J., Tindal C. J., Lord Abinger C. B., Park, Littledale, Gaselee, and Williams JJ., Parke, Bolland, and Gurney BB. were of opinion that the confession ought not to have been received.

In *Drew's Case*, 8 Carrington & Payne, 140, coram Coleridge J.,<sup>1</sup> a confession was held inadmissible, where the party was told that what he would say would be used for him or against him on his trial, the ground of which decision, it has been remarked, was probably this, that "the mind of man, especially the mind of a prisoner, is more prone to hope than fear." The *London Law Magazine*, vol. 27, p. 340, in an able article upon modern Common Law Reports. But this depends upon the constitutional temperament of the individual. Tacitus, a shrewd observer of human nature, remarks: *Fortes et strenuos, etiam contra Fortunam, insistere Spei; timidos et ignavos ad desperationem Formidine properare.*

In *Jones's Case*, Russell & Ryan C. C. 152, which came before the Judges on another point, the prosecutor said to the prisoner, before the confession was made, "he only wanted his money, and if he gave him that, he might go to the devil if he pleased." The confession was rejected. So in *Jenkin's Case*, Russell & Ryan C. C. 492, where the prisoner was induced by a promise from the prosecutor to confess his guilt.

In *Hearne's Case*, Carrington & Marshman, 109, on an indictment for arson, the promise was, in terms, confined to a different offence from that for which the prisoner was indicted. It was proved by the prosecutor, that soon after the house was discovered to be on fire, certain household articles were found in the sucker

<sup>1</sup> Overruled by *Regina v. Baldry*.

of the pump, and witness said to the prisoner, that if she did not tell the truth about those things he would send for the constable to take her, but that he did not say any thing about the fire. Coltman J. refused to admit the confession, on the ground that this was an inducement to confess, and that the transaction was really all one.

In *Mills's Case*, 6 Carrington & Payne, 146, a constable, whilst he had the prisoner in custody, asked him "whether he had committed the felony?" He denied it. The constable then said: "It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it." Gurney B. held this was an inducement, and refused to receive the statement. These words seem to have been construed by the learned judge as the same in effect, as if the constable had said, it will be better for you to confess it, for we can prove it, whether you do or not.

In *Shepherd's Case*, 7 Carrington & Payne, 579, a constable, who apprehended the prisoner, asked him "what he had done with the tap he had stolen from the prosecutor's premises?" and said, you had better not add a lie to the crime of theft." Gaselee J., after expressing some doubt, refused to receive the confession. The manner in which these words were used may have been considered by the learned judge, who saw and heard the witness, to be of a threatening nature, and calculated to lead the prisoner untruly to confess himself guilty; or the words may have been deemed in effect the same, as if the constable had said, you have committed a theft; it will better for you not to deny it, — that is, to confess. The words viewed in this light, imply an inducement rather than a threat. This case has been controverted. See 2 Russell Crim. Law (3d ed.) 829 note.

In *Thomas's Case*, 6 Carrington & Payne, 353, the words were, "you had better split and not suffer for all of them." Patteson J. rejected the evidence. These words seem calculated to have led the prisoner to suppose that he would be more mercifully dealt with if he would confess, and might therefore induce him to confess himself guilty of an offence which he had not committed. See note of the reporters, 6 Carrington & Payne, 353.

In *Enoch's Case*, 5 Carrington & Payne, 539, a constable, going to attend the inquest on the body of the deceased, placed a female with the prisoner to prevent her from going away, or laying violent hands on herself. This person said to the prisoner, in the absence of the constable, that "she had better tell the truth or it would lie upon her, and the man would go free." Parke J., after conferring with Taunton J., refused to receive this in evidence. He considered the prisoner as in the custody of the woman, who had held out the inducement. She was therefore to be deemed, *pro tempore*, as a person in authority over her. It has been doubted whether the words used to the prisoner in this case, held out either an inducement or threat, having a tendency to cause an untrue confession. And in *Regina v. Windsor*, 4 Foster & Finlason, 366, Channell B. and Crompton J. laid down the law in a similar manner. The decision in *Rex v. Enoch* is clearly right, though the last ground of the decision in *Regina v. Sleeman*, *Dearsly C. C.* 249; 6 Cox C. C. 245, is the other way. See this case stated at length, post pp. 578, 579.

Of the influence of a threat in excluding a confession, the following are examples: *Parratt's Case*, 4 Carrington & Payne, 570, where a threat of committal to prison was used by the captain of a ship to a mariner on board; and *Thompson's Case*, 1 Leach C. C. (4th ed.) 291, where the prosecutor threatened to take the

prisoner before a magistrate unless he would give a more satisfactory account. *Regina v. Luckhurst*, Dearsly C. C. 245. See also *Rex v. Shepherd*, 7 Carrington & Payne, 579, already cited, ante p. 574.

The leading case upon the second branch of the above proposition as to the sanction of a person in authority, is *Rex v. Simpson*, 1 Moody C. C. 410, before the Judges in 1834, the real import of which does not appear to be correctly abstracted in the text-books. It is a long case, and it is difficult to condense it without losing its true bearing; its substance however seems contained in the following abstract: The prisoner was indicted for maliciously setting fire to the house in possession of the prosecutor, Blackburn. The prisoner was about fifteen years old, and was a servant in the prosecutor's house. On the morning after the fire, Mrs. B. the mother of the prosecutor's wife (and who lived a few yards distant), told the prisoner in the prosecutor's house, in the presence of the prosecutor's wife, the prisoner's mistress, who was very deaf, and in the presence of the prisoner's mother, that she had better confess the truth, because she believed it was she that fired the house, and that it would be a great deal worse for her if she did not confess. The prisoner denied it. On the same day, she was taken by a constable before a magistrate at S.; and on the following day, Mrs. B. met her, and again charged her, — she again denied. Soon after, a witness (H.) came up and joined them, and said to the prisoner: "Don't be so bold; perhaps you will have to go to S. again to-morrow, — perhaps some one will come forward that saw you do it." She still denied it. He then said: "If you be guilty, go along with Mrs. B. and beg your master and mistress's pardon, and get away, and be better in future, and we shall not seek after you; never mind your wages; I'll give you a few shillings out of my own pocket." He also told her it would be better for her to confess. After he went away, Mrs. B. went with the prisoner to the prosecutor's house, and talked to her about the fire on the way; *they then went out of the house*, and after telling her, that if she went to S. again, it would be worse for her; and repeatedly, both on the road and also in the house of the prosecutor, and out of doors, that it would be a great deal better for her to confess, and a great deal worse for her if she did not. She said to her, out of the house, "now, you lighted the bunch of matches, and put it into the thatch." The answer to the question was, "Yes, I did." Mrs. B. then told the prosecutor's wife what had passed, *and she then came out*. Counsel for the prisoner objected to her answer being received, on the ground that after the promises and threats held out, she should have been cautioned. The learned judge (Littledale J.) received the evidence; but reserved the case for the opinion of the Judges. The prisoner was found guilty. In Easter term 1834 all the Judges met; and they were unanimously of opinion, that the confession ought not to have been received, and that the conviction was bad.

It appears from the above report, that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied sanction, that the prisoner was told, in the first instance, that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out in the prosecutor's house;<sup>1</sup> and although it does not appear distinctly whether the prosecu-

<sup>1</sup> Mr Greaves quotes this passage, and says: "This is an error; it was after they went out of the house." 3 Russell on Crimes, 392, note. 4th ed.

tor or his wife was then present,<sup>1</sup> the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife and in his house, may perhaps be considered to have continued.

That the wife of the prosecutor, where she is also the mistress of the prisoner (or, in the case of an offence committed against several persons in partnership, the wife of one of them, who assists in the management of their business, *Regina v. Warringham*, ante p. 487), is considered as a person in authority, is decided in *Rex v. Upchurch* before the twelve Judges, already cited; and was so held in *Sarah Taylor's Case*, coram Patteson J. 8 Carrington & Payne, 733. This rule however, as appears by the text (*Regina v. Moore*) does not apply to a case where the charge against the servant has no relation to the persons or property of the master or his family; e. g. to a case of child murder, or concealment of birth.

In *Rex v. Row*, Russell & Ryan C. C. 153, the prisoner was in the custody of a constable, when he was advised by his neighbors to tell the truth, and consider his family; and it might therefore be said that, prima facie, such advice was given with the implied assent or sanction of the constable. But there were probably circumstances in the case which negatived such assent, for the ground on which the confession is reported as having been deemed admissible by the Judges is, that the advice was neither given nor sanctioned by any person who had any concern in the business. The admissibility of the evidence in this case might it seems be supported upon quite a distinct ground, the advice given to the prisoner "to tell the truth," not implying either a threat, promise, or inducement to confess himself untruly guilty, unless the words "and remember his family" can be considered to make a difference. See *Rex v. Court*, 7 Carrington & Payne, 486, coram Little-dale J. post p. 578. *Rex v. Enoch*, 5 Carrington & Payne, 539, already cited, and which was decided upon another ground, might also perhaps be supported on this principle, that what was said to the prisoner by the person in whose custody she was placed by the constable, might be reasonably presumed by the prisoner to have been sanctioned by such constable. *Regina v. Moody* seems to fall within the same principle; 2 Crawford & Dix C. C. 347, an indictment for poisoning. A female witness stated, that when the prisoner, a young girl, was in the police barracks, witness said to her: "If any other person had to do in the case, it is better you should tell." The witness was not the prosecutrix; nor did she know whether the prisoner was in the actual custody of the police at the time or not. The counsel for the Crown argued that the statement was admissible, as neither threat nor promise was held out by the witness. *Torrens J.* refused to receive it. If the ground of this decision was the implied sanction of the police, who were present at the police barracks when the witness held out this inducement to the prisoner, it seems supported by previous cases.

The point may be considered to be settled, that, although the inducement to confess was not actually offered by the person in authority, if it were held out by any one in his presence, and he, by his silence, sanctioned its being made, the confession will be rejected. In *Regina v. Luckhurst*, Dearsly C. C. 245; 6 Cox C. C.

<sup>1</sup> The learned editor, in the same note, also says: "It is clearly to be inferred that they were not present; for after the prisoner said 'I did,' Mrs. B. told the prosecutor's wife, and she then came out."

243, the prisoner was indicted for an unnatural crime with a mare. Taylor, who kept his mare in a stable at an inn, of which Willard was landlord, saw the prisoner in the stable with the mare, under circumstances that made him suspect the commission of the offence. Willard and Taylor afterwards went to the prisoner, and Willard threatened to give the prisoner in charge to the police if he did not tell what business he had in Taylor's stable. At that time the charge had not been made known to the prisoner, but it was immediately afterwards, and then he confessed. The confession was held to be inadmissible in evidence. Parke B. delivered the opinion of the Judges as follows: "We, who have considered this case, which was not argued by counsel, are all of opinion that the evidence of Willard, to prove the confession, was not admissible. First of all, there was a threat used by him, for he says to the prisoner: 'If you do not tell me, I will give you in charge of the police.' It is true that at the time the threat was uttered, it was not precisely known what the charge was, but before the prisoner made any confession, he is told by Willard that the charge against him is that he had had connection with the mare. Willard, it may be objected, was not a person having any authority to hold out an inducement so as to render a confession made after it inadmissible. But the threat was made in Taylor's presence, who was there during the whole interview, and it was just the same as if it had been made by Taylor himself. Now he was the owner of the mare, and a likely person to prosecute him for the offence. He was therefore a person in such a situation that any inducement held out by him would prevent the confession being receivable. We think that this confession was made under an inducement of a threat held out by Willard under such circumstances as to render it equivalent to a threat by Taylor himself." See also *Rex v. Pountney*, 7 Carrington & Payne, 302; *Regina v. Laughner*, 2 Carrington & Kirwan, 225; *The State v. Roberts*, 1 Devereux, 259. *Regina v. Parker, Leigh & Cave* C. C. 42; 8 Cox C. C. 465, at first sight may appear the other way, but it may be sustained on another ground. See post p. 579.

But the threat or inducement held out must have reference to the prisoner's escape from the charge, and be such as would lead him to suppose, it will be better for him to admit himself to be guilty of an offence, which he never committed. It is not here meant that at the time when the inducement is held out, the charge against the prisoner must actually have been made; for where a man was threatened to be given into custody without any offence being then specified, but afterwards the nature of the charge was stated, and he confessed his guilt; the Judges held that the confession was not admissible. *Regina v. Luckhurst*, Dearsly C. C. 245.

In *Thornton's Case*, where a constable had harshly interrogated a boy of fourteen years of age, when under detention without a warrant, and accused him of telling falsehoods, and in a manner "calculated to intimidate" <sup>1</sup> and made him cry, but held out no promise or threat as to his escaping from the charge against him, the confession was held admissible by seven Judges out of ten. 1 Moody C. C. 27, Trinity term 1824.

In *Lloyd's Case*, 6 Carrington & Payne, 393, a person said to the prisoner in custody, his wife being also in custody on the same charge in a separate room: "I hope you will tell, because Mrs. G. (the prosecutrix) can ill afford to lose the money." A constable then said: "If you will tell where the property is you shall see your wife." Here an inducement was held out, and by a person in authority.

<sup>1</sup> The words of the judge, Bayley J. who tried the case.

Patteson J. admitted the evidence, as this was not such an inducement to confess as could exclude it; that it amounted only to this, that the prisoner should see his wife if he told where the money was. The prisoner was acquitted.<sup>1</sup>

Thomas's Case affords an instance of the meaning of the word "promise," as it affects a confession. The prisoner asked the witness whether it would be better for him to confess? He replied: "it would be better for him not to confess, but that the prisoner might say what he had to say to him, for it should go no further." The prisoner then made a statement. The prisoner's counsel objected that this statement had been obtained under a promise. Coleridge J. admitted the confession in evidence, and the prisoner was found guilty. The learned judge said, that the only proper question was, whether the inducement held out to the prisoner was calculated to make his confession an untrue one, and he thought that what was said by the witness to the prisoner had a contrary tendency. 6 Carrington & Payne, 353.

In Shaw's Case, 6 Carrington & Payne, 372, after the prisoner had been committed, another prisoner said to him: "I wish you would tell me how you murdered the boy; pray, split." So in the same case the witness had taken an oath, that he would not tell what the prisoner would say, whereupon the prisoner confessed. Patteson J. admitted the confession, as no inducement was held out that it would be better for him to confess.

In none of these cases was any promise made in reference to the escape of the party from the charge against him, or calculated to induce him to say what was untrue. In the two latter cases, the promise was not held out by a person in office or authority over the prisoner, and upon that ground, which however was not taken by the court, the confession was, as it will be seen hereafter, admissible. See the next proposition.

In Court's Case, 7 Carrington & Payne, 486, it was proposed to give in evidence the examination of the prisoner before the committing magistrate, who said: "No inducement was held out to the prisoner to confess. The prosecutor said, in the prisoner's presence, that he considered him to be the tool of another person. I then told the prisoner to be sure to tell the truth. He then made the statement." Littledale J. received the evidence, and observed that it could hardly be said that telling a man to be sure to speak the truth is advising him to confess what he is really not guilty of. The object of the rule relating to the exclusion of confessions, is to exclude all confessions which may have been procured by the prisoner's being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. See Enoch's Case, 5 Carrington & Payne, 539, cited ante p. 574.

The prisoner was indicted for setting fire to her master's farm building. She was about to go away from a policeman, but he prevented her, saying she was his prisoner upon the charge of this arson. She desired to change her dress. He said she might do so, but she must remain in custody; and he gave her into the charge of Mrs. Allen, who was a married daughter of her master, but did not live with her father, and had no control over the prisoner by reason of any rela-

<sup>1</sup> So in Green's Case, 6 Carrington & Payne, 656, where the prisoner, before making the confession, said: "If his handcuffs were taken off he would tell." It was remarked by Taunton J. that he believed no one ever made a confession voluntarily without proposing to himself some advantage.

tion of master and servant. Mrs. Allen went with her into a laundry, where her clothes were; but both Mrs. Allen and the prisoner considered that the latter was in custody. Mrs. Allen said to her: "Jane, I am very sorry for you; you ought to have known better; tell me the truth, whether you did it or no?" She said: "I am innocent." Mrs. Allen said: "Don't run your soul into more sin, but tell the truth." The prisoner then confessed. And on a case reserved upon the question whether the confession was legally admissible in evidence, it was held that there was no threat or inducement, and no sufficient authority on the part of Mrs. Allen to exclude a statement made in consequence of any inducement to confess held out by her. *Regina v. Sleeman*, Dearsly C. C. 249. "This case," observes Mr. Greaves, "can only safely rest on the ground that there was no threat or inducement. As Mrs. Allen had the prisoner actually in her custody, she clearly was acting in the prosecution, and, as such, was a person in authority; and it has been the uniform course, where a private person has actually had a prisoner in custody, to reject confessions obtained by any threat or inducement used by him, and no case was cited; and *Rex v. Enoch*, ante p. 574, is a direct authority against it on this point." 3 Russell on Crimes, 397 note. 4th ed.

John and George Parker were indicted for stealing and receiving hops, the property of Mr. Walker. Lamb, a policeman, had gone to George's house, where John and another brother, William, then were, and found some hops in a room up stairs. Lamb and the prosecutor then went into a parlor, where John, George, and William were. Lamb there charged William and John with stealing the hops, and George with receiving them, knowing them to have been stolen; on which William said: "Well, John, you had better tell Mr. Walker the truth." Neither the prosecutor nor Lamb dissented from or remarked on William's advice. Whereupon John said: "I will tell the truth; I did take some hops, and must risk it." Lamb then took the three to the Bridewell; and on their way John said, of his own accord: "I'll tell you how I got them hops," &c. Upon a case reserved, which stated that "if the confession was, under the circumstances, receivable, the conviction was to stand," the conviction was affirmed. *Regina v. Parker*, Leigh & Cave C. C. 42; 8 Cox C. C. 465. It was objected at the trial that the inducement was held out in the presence of the prosecutor and policeman, and acquiesced in by them, and therefore the confession was not admissible. The sessions overruled the objection, on the ground that there was no threat or promise held out by any person in authority &c. and deferred sentence until the opinion of the Court of Appeal should have been taken upon the point raised by the prisoner's counsel. The case was not argued, and the court only said: "The conviction must be affirmed;" and as it cannot be presumed that the court intended to overrule all the cases by which it has been settled that an inducement held out in the presence of a person in authority is the same as if it were held out by that person, it must be taken that the decision proceeded on the ground that desiring a prisoner to tell the truth is not an inducement; and this view of the case renders it consistent with all the authorities. 3 Russell on Crimes, 397 note. 4th ed.

The following is the judgment of Kelly C. B. in *Regina v. Jarvis*, Law Rep. 1 C. C. 96; 10 Cox C. C. 574 (1867): "While it is our duty to watch with a jealous caution the rules of law as to inducements to confess, for the sake of pub-



lic justice we must not allow consideration for prisoners to interfere with the rules or decisions of courts of law. In this case, do the words fairly considered import either a threat of evil or a promise of good? The prisoner was called up by his master and told: 'Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police; and I should advise you that to any question that may be put to you you will answer truthfully.' Pausing at these words, they would seem to operate as a warning rather than a threat, — as advice given by a master to a servant. What follows? — 'So that, if you have committed a fault, you may not add to it by stating what is untrue.' These words appear to have been added on moral grounds alone; there was no inducement of advantage. Under these circumstances, putting no strain one way or the other, the words amount only to this: 'We put certain questions to you; I advise you to answer truthfully, only that you may not add a fault to an offence committed, if any has been committed.' With reference to the last words, 'Take care; we know more than you think we know,' these amount only to a caution. The words, 'You had better tell the truth,' seems to have acquired a sort of technical meaning, importing either a threat or a benefit; but they were not used in this case. The words that have been used import only advice on moral grounds." Willes J. added: "The case would have been different, if it had appeared that the words used were: 'It is better for you to tell the truth.'"

In the case of *Rex v. Harris*, 1 Moody C. C. 341, where the admissibility of a parol confession was reserved, upon other grounds, for the opinion of the twelve Judges, one of the prisoners said to Evans (also a prisoner) in the presence of the magistrate, and when the examinations were about to be taken: "Speak the truth; you may as well speak the truth as not." Evans then made a statement, which was taken down by the magistrate, and received by Littledale J. in evidence. It appeared that immediately previous to these words being said to the prisoner the magistrate had said to him: "You are not obliged to say any thing; there is no compulsion."

In *Nolan's Case*, 1 Crawford & Dix C. C. 74, a constable told the prisoner that his father had been charged with the murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the crime but himself, and then made a confession. Doherty C. J., having conferred with Torrens J., admitted the confession, observing that although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted, on that ground, in refusing to receive it.

In *Cain's Case*, 1 Crawford & Dix C. C. 37, where the prisoner was indicted for concealing the birth of her child, a medical witness said he examined the prisoner in custody, and found that her breasts were full of milk; that he asked her whether she had not recently had a child, and added that if she refused to tell, he would examine her person more closely; the prisoner then said: "It is unnecessary to examine me, for I had a child." Torrens J. admitted this confession, on the ground that the witness was endeavoring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes admissions. See this case further, post § XI.

In Wright's Case, 1 Lewin C. C. 48, the magistrate told the prisoner, on his being brought up for examination, that "his wife had already confessed the whole, and that there was quite enough against him to send a bill before a grand jury." He then asked him what he had to say? The prisoner confessed. The admission of this confession was objected to. Parke J. admitted it, observing that "what the magistrate said was rather a caution than a menace."

There is an earlier case of *Rex v. Sexton*, Chetwynd's Supplement to Burn, title Confession, p. 103, decided in 1822, which appears irreconcilable with the law as above stated, but the authority of that case has been questioned. 1 Deacon Crim. Law, 424, 427. Roscoe Crim. Ev. 37. 2 Russell Crim. Law (3d ed.) 827 note. It differs from other cases in this circumstance, that the offer to confess came, in the first instance from the prisoner himself. The prisoner said to the constable: "If you will give me a glass of gin I will tell you all about it." The officer gave the prisoner two glasses of gin, and read over the confession thus obtained to the prisoner in presence of a magistrate, who told him that the offence with which he was charged affected his life, and a confession might do him harm. The prisoner said, that what had been read over was true, and signed the paper. Best J. considered both confessions inadmissible: That "the second confession would have been admissible if the magistrate had told the prisoner that what he had previously said to the officer could not be given in evidence against him, but, for want of this information, he might think that he could not make his case worse than he had already made it, and under this impression might have signed the confession before the magistrate." As to the latter ground and the rejection of the second confession, this case has not been followed by recent cases;<sup>1</sup> and the rejection of the first confession, which was made to the constable, is not supported by subsequent authorities. Even if the liquor given is sufficient to intoxicate the prisoner, and where it is imputed that it was given for that purpose, it has been held (*Spilsbury's Case*, 7 Carrington & Payne, 187, per Coleridge J.<sup>2</sup>) that a statement made by a prisoner under such circumstances is not therefore inadmissible.<sup>3</sup> It must either be obtained by hope or fear. The circumstance of his being intoxicated is matter only of observation

<sup>1</sup> See *Howes's Case*, 6 Carrington & Payne, 404. The prisoner was told by the magistrate that confessing would do him no good; but he did not tell him that his former confession to the constable would have no effect, or that it could not be given in evidence against him. Denman C. J. admitted the confession. See also *Lingate's Case*, 1 Phillpotts Ev. 430, coram Bayley J.

<sup>2</sup> So in *Vaughan's Case*, Foster, 240, 5 State Trials, S. C., for high treason, before Holt C. J., Treby C. J., Ward C. B. &c. a statement by the prisoner of a material fact, relating to the principal question of doubt in the case, whether the prisoner was a subject of the king of England, was admitted in evidence after argument, although it appeared on cross-examination that it was made on the night the prisoner was arrested, and when he was not sober. Upon the next morning, he positively denied the fact on his examination before the magistrate.

<sup>3</sup> Quære, on the ground in *vino veritas*. 1 Taylor Ev. § 804. In *Commonwealth v. Howe*, 9 Gray, 110, the court instructed the jury that evidence of intoxication was an objection to the weight, and not to the competency, of the testimony; and that if the defendant was so much under the influence of liquor as not to understand what he was confessing, they should disregard the confessions altogether. These instructions were held to be entirely right. And it was also held that the defendant might introduce evidence to disprove all the facts which he was said to have confessed.

by the judge upon the weight that ought to attach to this statement when it is considered by a jury. It seems a violent presumption, that two glasses of gin would induce a prisoner untruly to charge himself with a capital felony. The decision is the more remarkable, as the offer to confess came, in the first instance, from the prisoner. There was no promise in respect to the prisoner's escape from the charge, or his being let out of custody. The principle, as is remarked by a modern text-writer (1 Deacon Crim. Law, p. 424 note), in which a confession is inadmissible, is not because it is induced by some temporary indulgence to the prisoner, but because it is extracted by some promise of forgiveness and the hopes of escaping from punishment. The promise therefore made by the officer on this occasion seems more to have affected his credit as a witness than to have been such as wholly to exclude the evidence. The only proper question, as Mr. Justice Coleridge remarks, in a case already cited (*Rex v. Thomas*, 7 Carrington & Payne, 346), is whether the inducement held out to the prisoner is calculated to make his confession an untrue one. So Mr. Justice Littledale remarks in another case, *Rex v. Court*, 7 Carrington & Payne, 487. "The object of the rule relating to the exclusion of confessions, is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed." But the remarks of Best J. in regard to the first confession may perhaps be deemed extra-judicial, as there was another ground on which the learned judge dwelt at greater length, and on which the confession was rejected, a circumstance not generally alluded to in the text-books. The confession was not taken down by the officer from the lips of the prisoner, but written down from recollection after he left the prisoner. The learned judge accordingly said: "We have not the confession of the prisoner. We have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words — nothing that he says, that has any relation to the subject, being omitted, or any thing added (but as to this remark, see post *Harris's Case*, 1 Moody C. C. 341) except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language, a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower order of men have but few words to convey their meaning; and they know as little of expressions, that they are not in the habit of using, as if they belonged to another language. I will not receive this paper in evidence; and I hope that I shall not find a police officer again employed in preparing, either the depositions of witnesses or the confessions of prisoners." Alderson, counsel for the prosecution, said that Dallas C. J. had refused to receive, at a former assize at Norwich, a confession, because it was not in the prisoner's own words. MSS. cited in Chetwynd's Supplement to Burn's Justice, title, Confession, p. 103.

A well-known writer on the law of evidence, as administered in English

courts of justice, remarks, "that the cases are probably rare in which unfounded self-accusations occur, or at least where a jury would be misled by them; and certainly, the rule occasions, in a multitude of instances, the escape of the guilty. There is a general feeling, which seems to be well-founded, that the rule has been extended much too far, and been applied in some cases where there could be no reasonable ground for supposing that the inducement offered to the prisoner was sufficient to overcome the strong and universal motive of self-preservation." 1 Phillipps Ev. 424.

The Scotch law is much less scrupulous on this subject. In a work of high character, on the Practice of the Criminal Law of Scotland, it is said that confessions are received in evidence, or rejected as inadmissible, according as they are or are not entitled to credit. A free and voluntary one is entitled to the highest credit, and therefore it is admitted as proof; but where a confession is extorted by fear, or elicited by promises, it comes in a much more questionable shape; still it is admissible by our practice, leaving its credit to be observed on to the jury by the counsel for the prisoner, if it was given under circumstances which throw a doubt upon its credibility. In strong cases of undue influence it should be altogether set aside; where the evidence of that taint is not so strong, it should be received, reserving its credibility for the jury, who, if they do not deem it worthy of credit, will attach no weight to it whatever.

If a verbal confession has been made, even on a promise of safety or protection from the injured party, or any one else, except the public prosecutor, or those acting for him, it may, in public prosecutions, be proved against the panel, reserving its weight and credibility for the jury. The objection usually urged against verbal confessions is, that they were made under a promise of safety by some one whom the prisoner was entitled to consider as having a title to interfere in the matter. Thus nothing is more common than for a prisoner to confess (upon an understanding, express or implied) to the party injured, that he is not to be prosecuted; and this pledge he finds himself unable to redeem when the case comes to be insisted on by the public authorities. In such cases the rule is, that if the public prosecutor, or any person identified with him, as the procurator fiscal, sheriff, clerk of court, or the like, have given assurance of protection, the confession cannot be given in evidence; but that if the private party only, or an officious third person, as a constable or sheriff officer, or the like, has given such assurance, it cannot exclude the proof of such confession, however much and justly it may weaken its weight with the jury. The principle on which this is founded, is the same as that which lies at the bottom of all our rules on the subject — namely, that it is not in the power of a private party, by any promises or indiscretions on his part, to tie up the hands, or restrain the proof of the public prosecutor. By so doing he may limit or restrain himself, but he cannot affect those to whom the public administration of criminal justice is intrusted.

In England it is held that a confession, though extra-judicial, if duly proved, is of itself, without the aid of any additional circumstance, sufficient to warrant the conviction of a prisoner. This being the strong and decisive effect which they give to a confession, it is justly held by them that such a confession, to be admissible, must be proved to have been freely and voluntarily made; and that it becomes inadmissible if it is tainted by any promises of pardon or application of threats. But the case is widely different in this country, where no such effect is

given to a confession, how deliberately and solemnly soever it may have been made, but is only admitted as an article of evidence, to be taken into consideration with the other proof in determining on the guilt of the prisoner. When such is the law, it is reasonable that every confession, if proved by credible evidence, should be received against the prisoner; provided always, that it was not elicited by fraudulent or deceitful promises on the part of the prosecutor; and such accordingly is the law of Scotland. It is not to be imagined however, from this circumstance, that every confession of a prisoner is to have equal weight with a jury, or that they are not entitled, and indeed bound, to take into account all the circumstances under which it was given, and to give little weight to it, or throw it out of view altogether, according as these circumstances appear to incline less or more against the admissions. 2 Alison's Crim. Law of Scotland, 581, 582.

SECTION II. *A confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a person not in authority over the prisoner.*

In *Spencer's Case*, 7 Carrington & Payne, 776 (1837) Parke B. said, there was a difference of opinion amongst the Judges upon this point; but in a subsequent case of *Regina v. Sarah Taylor*, 8 Carrington & Payne, 734 (1839) in which *Spencer's Case* was cited, Patteson J. said: "It is the opinion of the Judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in the same case that learned judge said that he would have received in evidence the statement made by the prisoner, to one who was not the prosecutor nor a constable, nor in office nor authority,<sup>1</sup> but who had said to the prisoner, 'you had better tell how you did it,' if the inducement had been held out by such person alone." In that case the prosecutor's wife, who was also the mistress of the prisoner, having been present on the occasion, the learned judge held, that as she expressed no dissent, she must be taken to have sanctioned the inducement, and the statement was therefore excluded. The cases of *Rex v. Dunn*, and *Rex v. Slaughter*, 4 Carrington & Payne, 543, 544, in which Bosanquet J. held that "any person telling a prisoner that it will be better for him to confess, will always exclude a confession made to that person," were both cited on this occasion.

In *Dunn's Case*, the witness, to whom the prisoner wished to sell the book, which he was indicted for stealing, told him, "he had better tell where he got it." In *Slaughter's Case*, the confession was made by the prisoner to his fellow-workman, who told him "it would be better for him to confess." But now that the opinion of the Judges has been expressed, as stated by Patteson J. in *Sarah Taylor's Case*, it seems that the opinion of Bosanquet J., in the last two cited cases, cannot be considered law.<sup>2</sup> See *The State v. Potter*, 18 Connecticut, 166, 179.

<sup>1</sup> *Regina v. Sleeman*, Dearsly C. C. 249.

<sup>2</sup> The same might probably be said of the opinion of Parke J. after conferring with Littledale J. as reported in *Kingston's Case*, 4 Carrington & Payne, 387, where the inducement was held out by a surgeon who was called in to attend the prosecutrix, to whom poison had been administered: unless a person in that character can be considered a person in authority, or unless the inducement was held out in the presence, and therefore under the implied sanction of the prosecutrix, which does not appear in the very short report of the case.

*Rex v. Row*, which was brought before the Judges in 1809, Russell & Ryan C. C. 153, is the leading case upon the admissibility of a confession made to a person not in authority. Whilst the constable had some of the goods which were stolen, and the prisoner in his custody to take to the Guildhall before the magistrates, some of the neighbors, who had nothing to do with the apprehension, prosecution, or examination of the prisoner, officiously interfered and admonished the prisoner "to tell the truth, and consider his family," which was a large one. No answer or observation was made thereon by the constable, nor did the prisoner answer them; but he desired the constable to call upon him in an hour at the prison, which he did, and there the prisoner made a full confession. *Chambre J.* received this confession in evidence. The question was brought before the Judges. Nine were present: *Ellenborough C. J.*, *Mansfield C. J.*, *McDonald C. B.*, *Heath J.*, *Grose J.*, *Lawrence J.*, *Le Blanc J.*, *Chambre J.* They agreed that the evidence was admissible and the conviction right; "because the advice to confess was not given or sanctioned by any person who had any concern in the business."

In *Gibbons's Case* the witness, who was attending the prisoner in the capacity of a surgeon, stated that he held out no threat or promise to induce the prisoner to confess; but that a woman, who was present, said she had told the prisoner she had better tell all, and then the prisoner made the confession to the witness. *Park J.*, after consulting with *Hullock B.*, laid down, "that as no inducement had been held out by the witness, to whom the confession was made; and the only inducement had been held out, as was alleged, by a person having no sort of authority, it must be presumed that the confession to the witness was a free and voluntary confession. If the promise had been held out by any person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here some person, having no authority of any sort, officiously says, you had better confess. No confession follows; but some time afterwards, to another person, the witness, the prisoner, without any inducement held out, confesses. They (the Judges) had not the least doubt that the present evidence was admissible." The prisoner was acquitted on other grounds. 1 *Carrington & Payne*, 97, *coram Park J.*

So in *Hardwick's Case*, before *Wood B.* in 1811, a confession made before a magistrate was objected to on the ground that the wife of the constable had told the prisoner previously that he had better confess. The learned judge admitted the confession. This, it would seem, must have been on the ground that the constable's wife was not a person having authority. 1 *Carrington & Payne*, 98 in note.

So in *Tyler's Case*, 1 *Carrington & Payne*, 129, tried before *Hullock B.* in 1823, a confession made by one of the prisoners to a constable was tendered in evidence; it was objected to by the prisoner's counsel, who wished to show that the prisoner, being locked up alone in a room at a public-house, was told by a man that the other prisoner had told all, and he had better do the same, to save his neck; and that, on this, the prisoner confessed. What appeared in evidence however was, that the prisoner said that "a man had told him he had better tell all, for the other prisoner had confessed, but that he would not say a word, for he came too far north." *Hullock B.* held that as the promise, if any, was by a person wholly without authority, the subsequent confession to the constable, who

had held out no inducement, must be considered as voluntary. It was admitted, and the prisoner was found guilty.

It is true that in these cases the confession was not made to the person who held out the inducement, which has been said to make a distinction. Note to Gibbons's Case, 1 Carrington & Payne, 98.

But the ground upon which the Judges put their decision in Row's Case, Russell & Ryan C. C. 153, is not that the confession was made to one person, and the inducement held out by another, but on the ground that the advice to confess was not given or sanctioned by any person who had any concern in the business.

The question is, was the confession procured by an inducement which led the prisoner to suppose that it would be better for him to admit himself to be guilty of an offence which he did not commit. Per Littledale J., 7 Carrington & Payne, 487. If the inducement was so calculated, it would seem that the influence so produced would continue upon the mind of the prisoner, and so render inadmissible a confession made to another person present when the inducement was made, and within an hour after such inducement held out, as was the fact in Row's Case.

In a note to the last edition of a popular text-book, the cases of *Rex v. Upchurch* and *Rex v. Simpson*, 1 Moody C. C. 410, 465, are cited as if they were authorities for rejecting a confession, although the inducement is held out by a person not in authority, the word authority being applied to parties having power over the prisoner as masters, &c. Dickinson's Quarter Sessions, by Sergeant Talfourd (1841) 525 note (p.) See also 1 Phillipp's Ev. (8th ed.) 429. But it would appear that in both these cases the inducement was held out by, or with the sanction of, a person in authority. See ante pp. 573, 575.

In Berigan's Case, Irish Circuit Rep. 177 (Cork Lent Assizes 1841) the prisoner, who, with several others, was indicted for a burglary and larceny, had sent the Bridewell keeper to a magistrate to tell him he had something to communicate to him. The magistrate acted at this interview with great caution, and warned the prisoner not to say any thing that would criminate himself, as what he said would be taken down in writing and made use of against him on his trial. The prisoner replied, he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person charged with the same crime, who had confessed and been admitted queen's evidence; that the prisoner was aware of this; that it was to that he alluded when he said that he knew that the witness knew all; and that it was from the statement made by the person who had been admitted queen's evidence, that the prisoner was examined and his confession taken down. It was insisted that, under these circumstances, the confession was not admissible, as the caution, given by the magistrate, did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to imagine, that if he made a confession, he would be put in the same situation with the other person who had done so. Crampton J. after a lengthened argument, received the confession, observing that the magistrate stated, that, as far as he knew, the prisoner came forward voluntarily; that a mere formal caution of a magistrate would not be sufficient to set up a con-

fession, if it appears that such confession was made under the distinct impression of a previous promise or threat, but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was, in effect, telling the prisoner that he would get no benefit from his confession, and that he should, consequently, dismiss from his mind all expectation of getting any, if any such he had. In the above case there were similar confessions made by all the prisoners, under circumstances precisely similar. They were accordingly admitted. The prisoner was found guilty. It is not improbable that, in this case, the prisoner was induced to make the confession, by what his fellow-prisoner had done, and by his having been admitted as queen's evidence, but no promise, threat, or inducement was held out by any person in authority, "calculated to make his confession untrue." Per Coleridge J. *Thomas's Case*, 7 Carrington & Payne, 346.

The law, in this respect, is stated in modern text-books in terms which seem at variance with the preceding authorities. Thus in a *Treatise on the Law of Evidence* (2 Starkie, 36, ed. 1842) it is stated that a confession can never be received in evidence where the defendant has been influenced by any threat or promise.<sup>1</sup> The learned writer makes no distinction between inducements by persons in authority and by persons not in authority. In support of this proposition he cites *Warickshall's Case*, 1 Leach C. C. (4th ed.) 263; *Rex v. Rudd*, Cowper, 334; and 2 Hawkins P. C. ch. 46. But in *Warickshall's Case*, at the Old Bailey, in 1783, coram Nares J. present Eyre B. the confession was made after promises of favor held out by the prosecutor, a person in authority; and the remarks of the court must be understood accordingly. This case therefore does not appear to support the proposition. In the case cited by Mr. Starkie from Cowper, 334, *Rex v. Rudd*, Lord Mansfield says: "The instance has frequently happened of persons having made confessions under threats or promises. The consequence, as frequently has been, that such examination and confessions have not been made use of against them on their trial." But this observation of the learned judge, must be understood secundum subjectam materiam; it was made in a case, where the counsel for the defendant moved to have his client bailed, on the ground of her having been admitted and examined as a king's evidence by three magistrates — all persons in authority — "under the faith and confidence she reposed in them; and, taking it for granted they were perfectly acquainted with the duty of their office," when she "made a disclosure of every thing she knew." This case then falls strictly within the rule as already submitted, where the inducement is held out by a person in office or authority. Neither will Hawkins be found to sanction the proposition in question. In a note in the sixth, and perhaps in an earlier edition, but which does not form part of the original text, and is not found in the folio edition, it is laid down, in reference to "a confession of the defendant, taken by the common law, upon an examination before the Secretary of State, or other magistrates, for treason or other crimes," that "the identity of these examinations must be proved at the trial before they can be read in evidence (*Summary*, 263), and if they are not proved they cannot be admitted

<sup>1</sup> It is remarkable, that this work, though published in the year 1842, refers to but few of the cases on the law of Confessions, decided since the year 1834. See an able review of this work in *The London Law Magazine*, Vol. 27, p. 152.



orally, for a confession being the strongest proof of guilt, requires the highest authenticity (O. B. 1785, p. 861), and this confession must be without menace or undue terror. 2 Hale P. C. 285." The writer of this note is speaking of a confession made before magistrates or persons in authority; and the passage in Hale, referred to, is equally restricted. It occurs in the Pleas of the Crown, vol. 2, ch. 38, p. 284. In reference to examinations of the person accused, and informations against him, it is said: "As to the examination of the prisoner, it must be testified that he did it freely, without any menace or undue terror imposed upon him; for I have often known the prisoner to disown his confession upon his examination, and he hath sometimes been acquitted against such his confession; and the reason why these examinations and informations are allowable in evidence, under the cautions above premised is, because they are judges of record &c. and the informations before them upon oath are authorized and required by act of Parliament, and they are judges of the crimes upon which informations are taken." I have given the whole passage, although it is conversant about informations taken against, as well as confessions, made by a prisoner, to show that the proposition in Hale is not any more than that in Cowper, or in the note to Hawkins, an authority for the proposition laid down by Mr. Starkie, nor opposed to the qualified rule above submitted. It is stated, without qualification, in a modern edition of Hawkins, that "the human mind, under the pressure of calamity, is easily seduced, and is liable in the alarm of danger to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession therefore," it is said, "whether made upon an official examination, or in discourse with private persons, which is obtained from the defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted (O. B. 1786, p. 387), is not admissible evidence; for the law will not suffer the prisoner to be made the deluded instrument of his own conviction." This is not any part of the text of Hawkins, but is introduced into the margin of some of the later editions. It is also found in one of the later editions of Gilbert on Evidence, and was probably inserted by the editor, Lofft. It is not found in the early editions; and it is said that, "upon search in the Old Bailey papers, as above cited, the passage in terms is not found, though the words may have been used by Sergeant Adair, who tried the case referred to." In *Rex v. Gilham*, 1 Moody C. C. p. 194 note.

Mr. Justice Parke has said, as cited, 1 Phillipps Ev. 424 (8th ed.) in note, that "the doctrine of inducements has been carried to the verge of common sense;" and unless a line is drawn, confining the effect of alleged inducements to those held out by persons in authority, it would seem that the doctrine must become wholly indefinite, and depend upon the moral opinion of each individual judge, rather than on a uniform and settled rule of law.

In Hall's Case a witness was produced, who said that the prisoner Hall had desired him to apply to the justice to admit him as a witness for the Crown; for "that he had not entered the house, but had only stood at the door, while the other two prisoners went up stairs to commit the felony." It was objected, that as this confession was made with a view, and under the hope of being thereby permitted to turn king's evidence, it was not admissible against the prisoners, and the learned judge held that this was not a voluntary confession, and rejected the testimony. 2 Leach C. C. 559 (4th ed.) in a note, coram Adair Sergeant,

Stafford Spring Assizes 1790. This case is very briefly reported in a note of the editor to Lambe's Case. It does not appear whether the statement made by the prisoner was induced by a hope held out that he would be admitted king's evidence; nor does the character of the person to whom the confession was made appear. The prisoner stated the facts at the same time that he desired the witness to apply to have him admitted king's evidence. The confession became immaterial, as a subsequent confession before the magistrates was given in evidence, on which the prisoner was convicted, and the Judges held the conviction right. But this case seems to be overruled. It has been decided, that if a prisoner makes a confession with the hope, held out by a person *not in authority*, that he will thereby be admitted as queen's evidence, the confession will be received against him. *Regina v. Berigan*, Irish Circuit Rep. 177, per Crampton J. And the same result will follow, though his hopes have been excited by a constable or other officer, if on the trial of his accomplices he refuses to make a full disclosure, and thus violates the condition on which his claim to favor can alone rest. *Commonwealth v. Knapp*, 10 Pickering, 491-495 (1830) where this point is fully discussed. See also *Regina v. Boswell*, Carrington & Marshman, 584; *Regina v. Dingley*, 1 Carrington & Kirwan, 637; *Regina v. Blackburn*, 6 Cox C. C. 333.

In *Regina v. Gillis*, 11 Cox C. C. 69; 17 Irish Law Rep. N. S. 512, the prisoner had volunteered a statement implicating himself and others in the Fenian conspiracy to a constable who came to his house to search for arms. The constable asked the prisoner: "Had he any objection to tell that to the superintendent?" The prisoner said he had not; whereupon he went with the constable to the superintendent, and thence to a magistrate, where he made an information on oath to the same effect. The prisoner was not cautioned in the usual way, but no inducement was offered to him to make the information. A few days subsequently he was asked to come and hear the information read in the presence of the accused persons. He went, and made a further information, and on that occasion said: "I came here to save myself." No caution was given on this occasion, and he was bound over to prosecute, and was considered by the magistrate as an approver. The prisoner was not then in custody, nor was there any charge against him. Subsequently he refused to prosecute, and was then arrested, tried, and convicted. At the trial his own informations were received against him. Held, Monahan C. J. and Keogh J. dissentientes, that the informations were not properly received, and that the conviction was consequently bad. But by Fitzgerald B. and Deasy B., the first information was rightly received, as the prisoner gave no intimation of the expectation under which he made the information; but the second was inadmissible.

In *Thompson's Case*, 1 Leach C. C. (4th ed.) 291 Hotham B. said: "I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject; and under the present circumstances the prisoner's confession, if it was one, ought not to be received." But in this case the inducement was held out by the prosecutor, the receiver-general for the county, who had apprehended the prisoner, and taken him to his house, where the alleged confession was made. The words which the witness had used to the prisoner were: "Unless you give me a more satisfactory account, I shall take you before a magistrate." So in

Cass's Case, 1 Leach C. C. (4th ed.) 293 note, where the only evidence was an alleged confession, Gould J. told the jury they must acquit the prisoner; that the slightest hopes of mercy held out to induce him to disclose the fact was sufficient to invalidate a confession. But these remarks must be taken *secundum subjectam materiem*. The prosecutor, in the presence of a constable, who was taking the prisoner to a magistrate, said to the prisoner: "I am in great distress about my irons; if you will tell me where they are, I will be favorable to you."<sup>1</sup>

In regard to the proposition stated in this section, Mr. Greenleaf says: "Mr. Joy maintains the *unqualified* proposition that 'a confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a person not in authority over the prisoner,' and it is strongly supported by the authorities he cites, which are also cited in this section. See Joy on Confessions, § II. p. 23-33. His work has been published since the first edition of this book, but upon a deliberate revision of the point, I have concluded to leave it, where the learned Judges have stated it to stand, as one on which they were divided in opinion." 1 Greenl. Ev. § 223 note.

In South Carolina it has been held, that where the prisoner, after due warning of all the consequences, and the allowance of sufficient time for reflection, confesses his guilt to a private person, who has no control over his person or the prosecution, the confession is admissible in evidence, although the person may have ability and influence to aid him. *The State v. Kirby*, 1 Strobhart, 155. In delivering the opinion of the court, Evans J. said: "But where the confessions are made on inducements held out by private persons having no authority over the prisoner or the prosecution, there seems to be no satisfactory conclusion to be drawn from the authority of decided cases, so as to lay down any definite rule which can be applied to the almost infinite variety of cases which occur. The same difficulty does not exist where the confessions are made to one in authority. There, it is true, the rule may sometimes fail of meeting the truth on account of the difference in age, experience, and self-possession, in the midst of the most trying and difficult position in which man can be placed; yet in general it has been found to be a wise rule which excludes confessions made to such persons; and as it is always wise to narrow the bounds of discretion, whenever it is practicable, it has been adopted as a rule. But in the case of confessions made on suggestions of benefits, by private persons having no authority, the difficulty of laying down a more specific rule than the general one, that the confession must be voluntary, has suggested the idea that the question is a mixed one of law and fact, and that it must be left in a great degree to the judge to decide under all the circumstances, whether the threats or inducements were such as to overcome the mind of the prisoner. 1 Greenl. Ev. § 223. That seems to be the result to which the more modern cases lead; and a late writer on the subject has come to the conclusion, that a confession made to a private person under inducements held out by him, is admissible. Joy on the Admissibility of Confessions, § II.

<sup>1</sup> In a note to the second volume of Sir Gregory Lewin's Crown Cases, 125, the learned editor, after referring to some of the leading cases upon the subject, rightly concludes "that the cases seem to establish the principle that where a confession is obtained through the medium of a suggestion, made by a person from whom the prisoner can have nothing to hope or fear, it ought to be received."

SECTION III. *A confession is admissible, although it is elicited by questions put to a prisoner by a magistrate, constable, or other person.*

In *Regina v. Mick*, 3 Foster & Finlason, at p. 823, Mr. Justice Mellor thus addressed a superintendent of a police station: "I think the course you pursued in questioning the prisoner was exceedingly improper. I have considered the matter very much. Many Judges would not receive such evidence. I entirely disapprove of the system of police officers examining prisoners. The law has surrounded prisoners with great precautions to prevent confessions being extorted from them, and the magistrates are not allowed to question prisoners, or to ask them what they have to say; and it is not for policemen to do these things. It is assuming the functions of the magistrate without those precautions which the magistrates are required by the law to use, and assuming functions which are intrusted to the magistrates, and to them only. The evidence is admissible, but I entirely disapprove of this way of obtaining it." See also *Regina v. Toole*, 7 Cox C. C. 248; *Regina v. Hassett*, 8 Cox C. C. 511. "No cases," said Mr. Justice Foster, "require more careful scrutiny than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions." *Commonwealth v. Curtis*, 97 Massachusetts, at p. 578.

The leading authority upon this proposition is *Rex v. Wild*, which came before the Judges on a case reserved. 1 Moody C. C. 452 (1835). It is very briefly noticed in the books on evidence, and as it is a leading case, and appears to have been overlooked in two recent cases, it is given here at some length. The prisoner was tried for the murder of Elizabeth Smith, by drowning her in a pit filled with water. He was a boy about fourteen years old. Elizabeth and her sister Martha, one three years old, the other one, were both drowned. The prisoner was taken into custody by a person not a constable; and while in the inn, to which he had been taken, several neighbors were in the room and asked him questions about the children. A witness gave the following evidence: "I told the prisoner to kneel down and tell the truth. I was present when he was taken up. Neither I nor the person who arrested him are constables. That person took him into the parlor and began to question him how the children came to get into the pit; whether they fell or were put in? He said he should not tell them any thing about it. The person who arrested him asked him if he would tell any one else if he would go out of the parlor? The prisoner said nothing. The other then went out. I said to the prisoner: Now, kneel you down by the side of me and tell me the truth. He did kneel down. I said I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty. I then said, Did these children fall into the pit? I heard him say something. He said he pushed one in with one foot and the other with the other, but not purposely. A third person asked him if he had any malice or revenge? He said no." At a meeting of all the Judges in Michaelmas term 1835, except Denman C. J., Vaughan J., Boland B. and Bosanquet J. they held unanimously that the confession was strictly admissible; but they much disapproved of the mode in which it was obtained. The prisoner was transported for life. In this case there was no caution given; the statement was elicited by questions, and those questions were put by an unauthorized person.

In *Rex v. Thornton*, which came before the Judges, 1 Moody C. C. 27 (1824)

a confession was held admissible, made by a boy only fourteen years old to a chief officer of police, by whose directions he had been apprehended without a warrant, and obtained in answer to questions put to him by the officer, and at a time when the boy had been without food for nearly an entire day. This is a very strong case. The officer had ordered the prisoner to Bridewell of his own authority; and soon after said to him, that "in consequence of the falsehoods he had told and the prevarications he had made, there was no doubt but he had set the premises on fire;" and he asked him "if any person had been concerned with him or had induced him to do it." The prisoner said he had not done it. The officer replied, "he would not have told so many falsehoods if he had not been concerned in it; and he again asked him if any one had induced him to do it?" The boy then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. Bayley J. thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal,<sup>1</sup> and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the Judges. Seven Judges held the confession rightly received, on the ground that no threat or promise had been used. Best C. J., Bayley J. and Holroyd J. were of a contrary opinion. It does not appear that the prisoner was cautioned in any way. The statement was elicited by a police officer and by interrogatories, and those interrogatories put in a manner and under circumstances which would seem calculated to intimidate so young a boy, in such a feeble state of body, as he must have been at the time from want of food.<sup>1</sup>

In *Rex v. Gibney*, Jebb C. C. 15, in which the twelve Judges of Ireland, in 1822, held unanimously that the confession was admissible, it was elicited by questions put by two constables, in whose custody the prisoner then was on his way to jail. One asked him: "Did you kill the child?" the other: "Were you not a terrible man to do such a thing?" Both these questions were asked before the confession was made. The constables told him several times before he confessed, what a terrible offence he had committed — that it was a terrible thing for a man to murder his own child.

In *Rex v. Upchurch*, 1 Moody C. C. 465, the confession was made in answer to questions put by the mistress of the prisoner; but this does not appear to have been considered an objection to its admissibility in evidence, either by the prisoner's counsel or by the judge (Parke B.) who tried the case.<sup>2</sup>

In *Kerr's Case*, 8 Carrington & Payne, 179, it appeared that a policeman had put questions to the prisoner, a female, and had given her no caution that her answers would be used in evidence against her. The confession was admitted, and the prisoner was found guilty. Park J. said that there did not appear to have been any thing improper in the conduct of the policeman; though, treating it as a general question, it was better that it should not be done, and that he

<sup>1</sup> At the same assizes at which Thornton's Case was tried, Holroyd J. held that the mere fact of a confession being made by a prisoner while in unlawful custody, rendered it unavailing. Ackroyd and Warburton's Case, 1 Lewin C. C. 49. In Thornton's Case, supposing the custody to have been illegal, the officer had a direct interest in eliciting a confession from the prisoner, to give him an excuse for the apprehension or detainer of the party.

<sup>2</sup> Rejected on another ground, ante p. 578.

would not, if placed in such a situation, put a question to a prisoner without a previous caution. The counsel for the prisoner, although he animadverted in strong terms, when addressing the jury upon the impropriety of questions being so put by a policeman, and argued that the practice was objectionable, as the questions were put by persons for the most part uneducated, and at a time when the party, to whom they were put, was in a state of confusion and alarm at being charged with an act of felony, did not contend that the evidence was not strictly admissible, or that the court could reject it upon that ground.

In a case upon one of the Irish circuits, *Regina v. Francis Hughes*, Armagh Spring Assizes 1842, coram Crampton J. the case of *Regina v. Patrick Hughes and Margaret Hughes* was cited, 1 Crawford & Dix C. C. 115, coram Doherty C. J. as opposed to the law above submitted. But the point decided in that case was only that the admission of the prisoner did not go to establish, that he was aware of the guilt of the person whom he was charged with harboring at the time when that person remained in his house. The observations of the learned judge therefore, on the impropriety of an unauthorized person, without a previous caution, interrogating a prisoner with respect to his guilt or innocence, ought not it would seem to be cited as a decision upon the admissibility of a confession so obtained. Those remarks were extra-judicial, and may perhaps be understood in the sense in which Park J. in the case last cited expressed his disapproval of police officers questioning a prisoner without a previous caution; and the twelve Judges, in *Rex v. Wild*, before cited, expressed their disapprobation of the manner in which the confession was obtained. So Lord Denman C. J. in speaking of magistrates, says: "That before they receive a statement, they ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit." *Arnold's Case*, 8 Carrington & Payne, 621.

It may be proper that the police authorities should forbid the practice of questioning a prisoner by a constable; and it might reasonably induce caution, and perhaps suspicion, and a scrutinizing jealousy in jurors in investigating the credit of a confession obtained by such a person through such means; but the cases before the twelve Judges, both in England and Ireland, already cited, seem to establish that statements made in answer to questions put, without any caution, and by a person who has no authority to question a prisoner, are admissible in evidence. Their admissibility is a question of law—it is not for the jury, but only for the court. See *Nute's Case*, Chetwynd's ed. of *Burn's Justice*, cited post, p. 602.

In a case upon one of the Irish circuits, *Regina v. Devlin*, 2 Crawford & Dix C. C. 152, coram Burton J. who consulted with Brady C. B. where a prisoner was indicted for knowingly having in his possession copies of certain passwords of the Ribbon Societies, and a sub-inspector of police, who found the prisoner in custody in the police barrack, brought him to an out-house attached to the barrack and showed him the papers, and asked him whether he knew any thing about them—the statement of the prisoner was objected to, on the ground that it was in answer to an interrogatory put by an unauthorized person, and without any caution or warning. Burton J. is reported to have refused to admit the evidence. It may be remarked that in this case none of the English authorities appear to have been brought before the attention of that very learned and eminent

judge. In a later case, *Regina v. Francis Hughes*, coram Crampton J. Armagh Spring Assizes 1842, where counsel for the prisoner objected to a police constable being asked what statement the prisoner made to him when in custody, as it appeared that such statement was in reply to questions asked by the constable, which he had no authority to ask, and was not justified in asking, this case and *Margaret Hughes's Case*, already mentioned, were cited in support of this objection. The learned judge (Crampton J.) said "he had frequently had occasion to decide this question; and all these cases had been before him. The confession of a man to be admitted, is not to be extorted by fear nor educed by flattery; but where a prisoner voluntarily gives it, it may be received, whether the questions be put to him by an authorized or unauthorized person. Wherever the declaration is voluntary he would receive it; and that the doctrine in *Wild's Case* was the true one."<sup>1</sup>

It appeared afterwards that the statement was made in presence of a magistrate to questions asked by the constable, and that the magistrate expressly cautioned the prisoner. It was therefore unnecessary to decide the question; but the law, as stated by the learned judge, seems concurrent with the stream of authorities.

In *Regina v. Martin, Armstrong, Macartney & Ogle*, 197, a policeman who arrested the defendant asked him at the time, "had he any of the things," alluding to the stolen articles. To this question the prisoner's counsel objected, and cited *Regina v. Devlin*, *ubi supra*. Burton J. said: "In that case, the prisoner was asked as to his knowledge of passwords, an answer to which might, without more, have criminated himself under the provisions of the act of Parliament. Besides, there the prisoner was taken into a stable, and in that retired place questioned. It is likely that a judge would come to the conclusion that such conduct produced in the prisoner's mind a degree of fear that rendered his admission inadmissible against him.' But the authority of *Devlin's Case* has recently been questioned. 1 *Taylor Ev.* § 804 note.

In respect to confessions made to magistrates, the word "examination" in the act seems to imply, that the magistrate has a legal authority to put questions to the prisoner, as to the facts proved against him.

The old act of Philip and Mary also required justices to take the examinations of prisoners. A contemporary writer, Lambard, shows how the law was understood shortly after the statute was passed, as he contrasts its harshness with the mild spirit of the common law. When referring to that statute he says: "There also you may see if I am not deceived, the time when the examination of the felon himself was first warranted by our law; for, at the common law, his fault was not to be wrung out of himself, but rather to be proved by others." *Eirenarcha*, ch. 21, 208. So Dalton, in his *Country Justice*, ed. 1635, folio, cap. 111, p. 299, says: "By the common law, Nullus se ipsum tenetur prodere; neither was a man's fault to be wrung out of himself, no, not by examination only, but to be proved by others, until the statute of 2 & 3 Philip & Mary, ch. 10 gave authority to the justices of peace to examine the felon himself." In *Rees's Case*, 7 *Carrington & Payne*, 569, part of the prisoner's statement was made in

<sup>1</sup> MS. from the short-hand notes of John Adair, Esq. barrister at law, who reported the case for the Crown. See also the opinions of the same learned judge, in *Regina v. Martin, Armstrong, Macartney & Ogle*, 198.

answer to questions put to him by the magistrates; but it was afterwards read over to him, and he said it was correct. Lord Denman C. J. received the evidence notwithstanding the objection. In *Bartlett's Case*, 7 Carrington & Payne, 832, on an indictment for murder, the examination of the prisoner before the magistrate was objected to, on the ground that it appeared as if some parts of it were in answer to questions put by the magistrate. Bolland B. admitted the examination, saying, that it could not be rejected upon that ground. The prisoner was found guilty. So in an earlier case, *Rex v. Ellis, Ryan & Moody* N. P. C. 432, tried in 1826, where part of the examination was elicited by questions put by the magistrate, and the prisoner's counsel objected to its admissibility, on this ground, and *Wilson's Case* was cited, Holt N. P. C. 597, where Richards C. B. was reported to have refused to admit an examination obtained in a similar manner, Littledale J. admitted the evidence; and referred to a case at the Carlisle Spring Assizes 1824, cited in *Starkie on Evidence*, in which Mr. Justice Holroyd had received it. And see 1 Greenl. Ev. (7th ed.) § 225 note.

SECTION IV. *A confession is admissible, although it is elicited in answer to a question which assumes the prisoner's guilt, or is obtained by artifice or deception.*

Thus in *Rex v. Thornton*, 1 Moody C. C. 28, a chief officer of police, by whose directions the prisoner had been apprehended, said to the prisoner in custody, that "from the falsehoods he had told, and the prevarications he had made, there was no doubt but that he had set the premises on fire;" and after questioning him whether any person had been concerned with him, added, "he would not have told so many falsehoods if he had not been concerned in it;" and again asked "whether any person had induced him to do it?" The prisoner then made a confession. Seven out of ten of the Judges held that the confession was rightly received.

In *Burley's Case*, the prisoner was told untruly, and as an artifice, when in jail, that his accomplices were in custody. Upon hearing this, which was said to induce a confession, he confessed. The confession was admitted in evidence. Cited in 1 Phillipps Ev. 427, as having been decided in Easter term 1818; mentioned also by Roscoe and by Starkie, 2, 23, note m (ed. 1824); 2, 13, note 3 (ed. 1842) who says the conviction was afterwards approved of by the Judges. It was also held in this case that where a confession is made with the view and under the hope of thereby being admitted king's evidence, and the party afterwards refuses to give evidence on the trial of his accomplices, he may be convicted upon such confession. 2 Starkie Ev. 13, note 3. ed. 1842.

In another case before Littledale J. 1 Phillipps Ev. 427, a constable, in order to extract a confession, assumed the prisoner's guilt, and asked her, "how she came to poison her uncle?" The confession was received, and the prisoner was convicted.

In *Rex v. Gibney, Jebb* C. C. 15, already cited on another point, where the twelve Judges of Ireland were unanimously of opinion that the confession was admissible, the expressions used by the constables to the prisoner, previous to the confession, seem to assume his guilt. One of them said: "You must be a very unhappy boy to have murdered your own child, if it be the case." Another said:



"Were you not a terrible man to do such a thing? What a terrible offence you have committed! It is a terrible thing for a man to murder his own child."

But in a case on one of the Irish circuits, *Regina v. Doyle*, coram Bushe C. J. 1 Crawford & Dix C. C. 396, where a police constable stated that he visited the prisoner in jail after her committal, that he cautioned her against saying any thing which might criminate herself, or be used for the purpose of convicting her; and, that after having done so, he said to her: "How did so much of your blue come into the child's stomach?" Bushe C. J. refused to receive the confession in evidence. It does not appear that any one of the preceding cases was brought before the attention of the court in this case, nor upon what ground the evidence was rejected, whether because the answer was elicited by a question put by a constable, or on the ground that the question assumed the prisoner's guilt. The learned judge is reported as having said, generally, that the prisoner's answer to this interrogatory, put by the person and in the manner proved, was not admissible against her. It is submitted that this case is not law. See 1 Taylor Ev. § 804 note. 5th ed.

"No prisoner, as Lord Denman C. J. remarks in *Arnold's Case*, 8 Carrington & Payne, 622, *ought to be entrapped into making a statement*;" but where the confession is voluntary, and after a distinct caution from the officer not to say any thing which may criminate, or be used for the purpose of conviction, it would seem that there is no inducement held out to the prisoner to confess himself untruly guilty, which is the test of the admissibility or inadmissibility of a confession. Mr. Phillipps, in commenting upon a case, where evidence similar and stronger in degree was admitted, observes: "There was no reason to suppose, which is the main point to be considered, that the inducement held out was calculated to make the confession an untrue one." 1 Phillipps Ev. 427.

SECTION V. *A confession is admissible, although it does not appear that the prisoner was warned that what he said would be used against him, or although it appears that he was not so warned.*

As to the examination of a prisoner by a magistrate, the statute does not require that it should appear upon the examination that the magistrate gave any caution to the witness, 9 Geo. IV. ch. 54, § 2;<sup>1</sup> and if the prisoner has signed it, it is not necessary to produce, on the part of the prosecution, either the magistrate before whom it was taken, or the clerk who wrote it down, to state that a caution was given. Proof of the signature of the prisoner and of the magistrate is strictly sufficient. *Hopes's Case*, 7 Carrington & Payne, 136, coram Vaughan and Patteson JJ. *Taylor's Case*, Ibid. 138, coram Patteson J. *Rees's Case*, Ibid. 569, coram Lord Denman C. J. *Foster's Case*, 7 Carrington & Payne, 148, coram Alderson B. *Pikesley's Case*, 9 Carrington & Payne, 124, coram Parke B. See also what Abbott C. J. says in *Spencer's Case*, 1 Carrington & Payne, 261, and 2 Russell (2d ed.) 659. In *Foster's Case*, 7 Carrington & Payne, 149, Bosanquet J. and Alderson B. said, in reference to Lord Hale's doctrine, 2 P. C. 52, 284, that it could not be intended that the magistrate or his clerk must be called, on account of their office; but that any one who could show that the examination was duly taken would be sufficient. Parke B. in *Pikesley's Case*, 9 Carrington & Payne, 124, says, in respect of depositions

<sup>1</sup> See also the form in *Hayes's Digest of the Criminal Statute Law of Ireland* (ed. 1842) 259.

against a prisoner, "that in so serious a case" (the prisoner was indicted for an unnatural offence) "it was very desirable the magistrate should be present, although, in point of law, it was not necessary." In *Court's Case*, 7 *Carrington & Payne*, 487, the magistrate, before whom the examination was taken, only said, he held out no inducement to the witness — he told him "to be sure to tell the truth," *Littledale J.* received it in evidence. So in confessions made to constables or others, it is not only unnecessary to prove, on the part of the prosecution, in order to render a confession admissible, that the prisoner was cautioned, or told that what he would say would be used in evidence against him; but such confession, if voluntary and free, is admissible, although it appears that he was not cautioned. *Thornton's Case* and *Wild's Case* before the Judges, already cited, establish this. In *Long's Case*, 6 *Carrington & Payne*, 179, where the constable, on taking the prisoner, told her that "the charges were made against her by the accessory, and that there was a serious oath against her that she had set fire to the ricks," whereupon the prisoner made a statement, it is evident, from the report of the case, that no caution was given. In *Richard's Case*, 5 *Carrington & Payne*, 318, a confession was received, made to a constable without any caution, whilst he had the prisoner, a girl of about fifteen years of age, in his custody, and was taking her to a meeting of the magistrates, although an inducement to confess had been held out to the prisoner on the preceding evening by the prosecutrix. In *Rex v. Gibney*, *Jebb C. C.* 15, 17, 18, 20, already cited on another point, it appeared that the constable, in answer to whose question the confession was elicited from the prisoner in custody, did not tell the prisoner that what he said he would give in evidence; nor was he told the consequences of such confession; and one of the constables said, in his examination on the trial, that he believed the prisoner was not aware that it would be given in evidence against him; but as neither threat nor hope was held out, the Judges were unanimously of opinion that the confession was rightly received.

In the case of *Rex v. Magill*, on an indictment for felony, the confession taken by a magistrate on an examination of the prisoner, was received, although the magistrate admitted he had not warned the prisoner of the legal consequences of making such statement. *McNally on Evidence* 38, *Trinity Summer Assizes 1799*, coram *Chamberlain J.* This case is referred to in *Phillipps on Evidence*. So in *Layer's Case*, 8 *Modern*, 89; 16 *Howell's State Trials*, 215, cited in *Lambe's Case*, 2 *Leach C. C.* (4th ed.) 559, it does not appear that any caution was given to the prisoner before the Privy Council.

The practice of telling a prisoner not to say any thing to criminate himself, is not recognized by law. In *Arnold's Case*, 8 *Carrington & Payne*, 622, *Lord Denman C. J.* says: "The frequent warnings given to prisoners not to say any thing that may criminate themselves, renders it necessary for me to set right a prevalent error on this subject." The proper course of proceeding on the part of the magistrate is thus stated by *Gurney B.* in *Greene's Case*, 5 *Carrington & Payne*, 312: "To dissuade a prisoner from confessing is wrong. He ought to be told that his confession will not operate at all in his favor; that he must not expect any favor because he makes a confession; that if any one has told him it will be better for him to confess, or worse if he does not, he must pay no attention to it; and that any thing he says to criminate himself will be used as evidence against him on his trial. After that admonition he ought to be

left entirely to himself, whether he will make any statement or not; but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice." So in Arnold's Case, Lord Denman C. J. says, a prisoner is not to be entrapped into making a statement; but when he is willing to make one, it is the duty of magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have been before on the prisoner's mind that that statement may be used for his own benefit; and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. 8 Carrington & Payne, 622.

An omission however in this respect, will not, as appears from the preceding cases, render a confession inadmissible.<sup>1</sup>

SECTION VI. *A confession is admissible where it is induced by spiritual exhortation or persuasion to confess, not held out with any view of temporal benefit.*

The case of *Rex v. Radford* seems at variance with this position. Coram Best C. J. Exeter Summer Assizes 1823, cited by Mr. Moody (ex relatione Coleridge) counsel for the prisoner, in *Rex v. Gilham*, 1 Moody C. C. at p. 197. It appeared that a clergyman had prevailed on the prisoner to confess, by dwelling on the heinousness of the crime with which he was charged, and the denunciations of Scripture against it, without giving him any caution that his confession would be used in evidence against him. The judge refused to allow the clergyman to state the confession, saying, that he thought it dangerous, after the confidence thus created, which would throw the prisoner off his guard, and after the impression thus produced, to allow what he then said to be given in evidence against him. This case was decided on the Western Circuit; but it is said, in argument,<sup>2</sup> that the case was not decided on the ground above stated, but that the judge thought it was, in that case improper in the clergyman to violate the confidence reposed in him by the prisoner, and he expressed a strong opinion to that effect, and as the evidence was not wanted for the Crown, it was not pressed, and the prisoner was convicted without it.<sup>3</sup> It seems difficult to maintain this case

<sup>1</sup> It is remarked in respect of the law of evidence as administered in England, and contrasted with that of other countries, that "those English justices of peace, who seem alarmed at the least chance of hearing truth from a culprit, and so earnestly entreat him to disclose nothing that can ever tend to bring guilt home to him, are rather to be admired for romantic generosity than for wisdom, or any beneficial consequences resulting from that conduct to the public. Innocence may be deprived of great advantages if deterred from promptly telling its own unvarnished tale. To keep back full information is, in some events, nearly equivalent to confessing guilt; and the warning, which prevents the story from being related at the earliest moment, may prevent it from producing at any time its just effect. But supposing that the culprit, eager for his release, should choose to commit himself by falsehoods, or betray real facts which go to his conviction, we cannot conceive that any harm is done. Between the opposite methods of compulsive interrogation and an indiscriminate injunction of silence, common sense suggests a middle course, which leaves the party to judge and act for himself. If he is blessed with self-command, and is in possession of the means of at once refuting his pursuers, why should his vindication be delayed? But as he may be incompetent to do so, or unprovided with the necessary proofs, let him be calmly told by the magistrate that no unfair inference will be drawn from his reserving his defence for a more convenient season." — *Edinburgh Review*, March 1824.

<sup>2</sup> Sir William Webb Follett, in argument in support of the conviction in *Rex v. Gilham*, 1 Moody C. C. at p. 202.

<sup>3</sup> In *Rex v. Sparkes*, on an indictment for a capital offence, tried by Buller J. on the North-

on the ground first above stated, that, because "a confidence is created" between the clergyman and the prisoner, and because the prisoner "is thus thrown off his guard," his confession is not admissible in evidence. It has been held, that although a witness says to the prisoner that the confession shall go no further (*Thomas's Case*, 7 *Carrington & Payne*, 345) or even takes an oath that he will not mention what the prisoner says (*Shaw's Case*, 6 *Carrington & Payne*, 373) and thus induces him to confess, this does not make the confession inadmissible, although a confidence is thus created in the mind of the prisoner, and he is thrown off his guard. If an accomplice, who is indicted as an accessory before the fact in a capital case, receives a promise from the attorney general that he shall not be farther prosecuted if he will become a witness for the government, and makes a full disclosure, and upon such promise makes a confession, but afterwards refuses to testify, he may be put on his trial; and this confession is admissible in evidence against him. *Commonwealth v. Knapp*, 10 *Pickering*, 478, 485-495.

The true question seems to be, does such confidence render it probable that the prisoner should be thus induced untruly to confess himself guilty of a crime of which he was innocent?

The object with which the law admits a confession in any case in evidence is to obtain truth. The only ground on which a confession is rejected is, that the circumstances under which it was obtained have a tendency to falsehood; and therefore the object with which it is admitted, instead of being secured, is likely to be frustrated. If any hope or fear acts upon the mind of a prisoner, and induces him to make an untrue confession, such confession is more likely to defeat than to secure the ends of justice. But if a confession flows, in the language of the court in *Warrickshall's Case*, 1 *Leach C. C.* 263 (4th ed.) "from the strongest sense of guilt, it is admitted as proof of the crime to which it refers." It seems difficult to imagine that a man under spiritual convictions, and the influence of religious impressions, would therefore confess himself guilty of a crime of which he was not guilty; or that a man, under a strong sense of his spiritual relations with God, could hope to please God by a falsehood; that "a confidence created" between him and his pastor, or the "being thrown off his guard" by this confidence, should induce him — not to confess (that it might naturally do if he were guilty), but induce him to confess falsely. Such spiritual convictions, or spiritual exhortations, seem, from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the

ern Circuit, the prisoner, a Roman Catholic, had made a confession before a Protestant clergyman, which was admitted in evidence on the trial, and the prisoner was convicted and executed. This case is cited by *Garrow* in *Dubarre v. Livette*, 1 *Peake N. P. C.* 109, at *Guildhall*, 1791. Lord *Kenyon C. J.*, who tried the latter case, said that he should have paused before he admitted that evidence. In *Broad v. Pitt*, 3 *Carrington & Payne*, 519, *Best C. J.* said, that the privilege of not disclosing communications does not apply to clergymen; "but," he added, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence." This observation was however extra-judicial. The learned judge added further: "The case of privilege does not apply to clergymen since the decision the other day in *Gilham's Case*." *Carrington Suppl.* 61. *Quære*, was this point decided in *Rex v. Gilham*, 1 *Moody C. C.* 197?

motive which induces it is calculated to produce untruth, — because it is likely to lead to falsehood. If temporal hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.

A writer of character on the criminal law of Scotland observes, in reference to this subject (2 Alison on the Crim. Law of Scotland, 586) : “ If confessions are made to a jailer or magistrate in consequence of the exhortations of a clergyman, these are rightly received as evidence, because law cannot inquire into the conscientious motives which may influence a guilty man to unburden his conscience.” The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. Per Littledale J., 7 Carrington & Payne, 487.

Upon principle therefore it would seem that the opinion of the learned judge in Radford's Case is not law ; but there is very high authority upon this question. *Rex v. Gilham* is the leading case, 1 Moody C. C. 187 (1828). It is not accurately abstracted in any of the text-books, and is therefore given here at some length. The prisoner was tried and convicted for murder. He had been examined as a witness at the inquest on Monday, and was examined before the mayor at several times. The day after he was apprehended, which was on Wednesday morning, several articles belonging to the person in whose house the prisoner and deceased had lived as servants, were found in a room hired by the prisoner ; and being opened in the town-hall, in presence of the prisoner, he went to the jailer and said : “ Well, they will hang me for this, I know ; but I thank God I am innocent of the murder.” The jailer said to him : “ Don't add lies to crime.” On the following morning the jailer said to the prisoner, who appeared very much distressed that he should not be doing his duty if he did not tell him that it was his firm opinion that he was the man who did the deed. The prisoner clasped his hands together ; the jailer said : “ It is done now : and cannot be helped.” The prisoner said : “ No, it cannot.” The jailer, after pointing out to the prisoner several passages in the Church of England prayer-book, particularly the opening sentences of the service, told him if he wished to have a spiritual adviser he would endeavor to get him one. After some conversation, the prisoner expressed a wish to see the chaplain of the jail. The chaplain asked him why he sent to him ? The prisoner answered, to read and pray with him. The chaplain then explained to him the nature of true repentance, and that it was not a mere acknowledgment of sin, but a deep search into ourselves, and when we found ourselves defaulters, to confess the same before God. He told him also that before God it would be better for him to confess his sins. On his examination as a witness in the case, he said that he mentioned “ before God ” every time he used the word “ confessing.” He also told him that next to confessing before God, a most important part of the duty of repentance was to repair, by all means in his power, the injuries he had done to his fellow-creatures, and any injury done to the laws of his country. These matters were urged upon religious consideration, and on assurance that such confessions would be of spiritual benefit, and would tend to the acceptance of the prisoner with God. As he read part of the communion service to the prisoner, who seemed extremely agitated, he thought that the prisoner was on the point of making some immediate communication to him, and asked him if he would send for the jailer, meaning it with a

view of the prisoner making a communication to the jailer, because he considered he had made a great impression on the prisoner. He told the prisoner that while any thing was pressing on his mind no services of his would afford him real comfort; that he did not wish him to confess to him, but to bear in mind the subject on which he had talked and read. In the second interview on the same day, the prisoner alluded to the murder, when the chaplain entreated him, if he knew himself guilty, to avail himself by the means of general repentance and faith in Christ to be reconciled with God. At one time during this interview, he told him that his fear which he had expressed to the prisoner in the morning, respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind he could not afford him consolation by prayer. The first interview lasted about two hours; the second about an hour and a quarter. Both interviews were upon a Friday. The jailer then saw the prisoner, and told him what had passed between himself and the prisoner's wife, and that he was perfectly satisfied what he (the jailer) said in the morning was correct. The prisoner then said he would tell the jailer all about it. The jailer said: "Don't tell me any thing but what you would wish the mayor and magistrates to know, for whatever you tell me I must inform them of." The prisoner made a confession, and said he wished it to be communicated to the magistrates; and said he had endeavored to make up his mind to confess before, and had a great mind on Monday. He requested that the mayor should come and hear what he had to say. The mayor came next morning, and said to him: "Before you say any thing I think it necessary to apprise you, as I have done several times during your examination, that it will probably be given in evidence against you. You are therefore to exercise your own discretion, and say little or nothing as you may think best; and if you have changed your mind since you sent to me, and do not choose to say any thing, I will retire." The prisoner confessed, and subsequently made confessions to other officers. The judge, Littledale J., received the confessions, but as he thought the point as to these confessions was new, he reserved it for the opinion of the twelve Judges. The case came before the Judges in Easter term 1828, and was very ably argued on both sides, by Mr. Moody for the prisoner, and by Sir William Webb Follett (then Mr. Follet) for the prosecution. All the Judges were present except Hullock B. They were unanimously of opinion that the confessions were properly received. The prisoner was afterwards executed. It was contended on the part of the prosecution, at the trial, that even supposing that the confession made to the jailer, immediately after the chaplain's interview with the prisoner, was not receivable in evidence, still that the confession made to the mayor was receivable, inasmuch as the mayor expressly cautioned him. The judge however was not influenced by this circumstance in receiving the confessions. Indeed it could not have been a ground for receiving all the confessions. He said that after what the chaplain had said to the prisoner, nothing which the mayor said could do away with the effect that had been produced in the prisoner's mind, and that it differed from those cases where (a confession having been made under circumstances which prevented its being received in evidence) if a magistrate has cautioned a prisoner not to say any thing against himself, a subsequent confession, made before a magistrate, has been admitted in evidence. Besides, the judge reserved the question, "because the point as to these confessions was new," a remark which would

not have applied if the circumstance of the caution by the magistrate had formed any part of the question reserved. In the argument before the Judges also, the counsel for the prosecution alluded so slightly to that circumstance, that the counsel for the prisoner in reply did not address his arguments at all to it. The learned counsel who argued on behalf of the prisoner before the Judges is also the reporter of the case, and the marginal note in which he embodies what he considered the substance and the grounds of the decision, is this: "A confession, made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible." This case therefore seems an express decision of very high authority that a confession, made in consequence of spiritual exhortation or persuasion to confess, unaccompanied by any promise, and not held out with any view of temporal benefit, is admissible in evidence against a prisoner.

A recent writer thus observes of this case: "The chaplain of the jail passed three hours and a half with a man, pressing him in the strongest way to confess, and reading (amongst other things) the commination service, a commination or denouncing of God's anger and judgment against sinners. The ground upon which the case appears to have been decided was, that religious considerations could never induce a man to tell a lie." Stephen, "A General View of the Crim. Law," p. 323. And see Best on Evidence, p. 719. 4th ed.

An earlier case, which also came before the twelve Judges, illustrates the same principle. In *Sarah Nute's Case*, Chetwynd's Suppl. to Burn, 101, decided in 1800, and cited as MS. C. C. R., the prisoner's mistress, whose out-house had been set on fire, pressed her to confess, and told her, amongst other things, that God would forgive her. She confessed. The next day another person told her, her mistress said she had confessed and drew from her a second confession. The judge (Lord Eldon) and the jury were of opinion, that the first confession was made under a hope of temporal favor, and that the second was made under the influence of having made the first. On a case reserved, the Judges held that those points were not for the jury, but that if the learned judge agreed with the jury, the confessions were receivable; but many of them thought the expressions were not calculated to raise hope of favor here, and if not, the confessions were not evidence.

In *Commonwealth v. Drake*, 16 Massachusetts, 161 (1818), the defendant was indicted for an act of open and gross lewdness. His confessions, voluntarily made to members of the same church, as penitential confessions, were held to be admissible in evidence.

In *Rex v. Gibney*, Jebb C. C. 15, before the twelve Judges of Ireland in 1822, it was held unanimously that although a confession should not be received in evidence if any threats or intimidation has been held out, the fear must be of a temporal nature; that in this case there was no such threat or intimidation, nor any fear of a temporal nature produced; any terror that might have been excited was as to what might happen in the next world. The expressions used by the constables were: "You must be a very unhappy boy to have murdered your own child, if it be the case?" "Were you not a terrible man to do such a thing?" These expressions were used before the prisoner confessed. There was a great cry of the people about him at the time. One person was anxious the prisoner should touch the body, it being a popular opinion that if the murderer touches the body of the deceased it will bleed.<sup>1</sup>

<sup>1</sup> Upon this subject it is remarked by a writer on Scotch Criminal Law already quoted, that

SECTION VII. *A confession is admissible in evidence made to one in authority, although the prisoner was, immediately before such confession, in the custody of another person, not produced; and although it is not shown that such person did not hold out a threat or inducement.*

The rule has been stated thus: "For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the promise was made. 1 Phillips Ev. 430.

In Clewes's Case, 4 Carrington & Payne, 223, it appeared that the prisoner had an interview with a magistrate, and subsequently with the coroner. The coroner's clerk was produced, who proved that the prisoner was duly cautioned by the coroner. It was objected by counsel that the magistrate might, at the previous interview, have told the prisoner it was better for him to confess, and that therefore the magistrate ought to be called on the part of the prosecution. Littledale J. said, it would be fair in the prosecutors to call him; but that he would not compel them to do so. He was called by the prisoner, and the confession was then admitted.

In Rex v. Gibney, before the twelve Judges of Ireland, Jebb C. C. 15, the constable, to whom the confession was made, stated at the trial, that before the prisoner confessed, the son of the prisoner's master had taken the prisoner aside and held some conversation with him. This person was not produced. It also appeared that the prisoner had been with a magistrate before the witness received him under a committal. That witness had found him in custody with that magistrate. The magistrate was not produced.

If however there be any probable ground to suspect collusion in obtaining the confession, such a suspicion, it is said, ought, in the first instance, to be removed. 1 Phillips Ev. 430.

Thus in Swatkins's Case, 4 Carrington & Payne, 550, a constable was called to state a confession made to him by the prisoner. He said that he went into a room in a public-house, where he found the prisoner in the custody of another constable, and that as soon as he (the witness) went into the room, the other constable left it. It did not appear why he went into the room, or why the other constable went out; but immediately after the latter went out the prisoner made the confession. Patteson J. said, that under these circumstances, and it appearing that the prisoner, after one constable left the room, at once began to make the statement to the other; and as the witness did not caution the prisoner, that it would be unsafe to receive such evidence, and would lead to collusion between constables. Another witness was called, and stated that the prisoner was not in custody under a charge against him; but that he and the other servants of the prosecutor having gone to be examined as witnesses, the prisoner attempted to

in an old case, a minister of religion was examined as to a confession made in his presence, and that of two bailies of the borough, and that there is nothing exceptionable in the admission of such testimony, if he heard the confession *tanquam quilibet*; that is, if he heard it as an ordinary acquaintance or by-stander, and not in the confidence and under the seal of religious duty. But our law utterly disowns any attempt to make a clergyman, of any religious persuasion whatever, divulge any confessions made to him in the course of religious visits, or for the sake of spiritual consolation, as subversive of the great object of punishment, the reformation and improvement of the offender. Alison Practice of the Crim. Law of Scotland, 586.



run away, when the constable caught him and detained him as an unwilling witness; and it appearing that the party was not then under any charge, the learned judge received the statement in evidence without requiring the prosecutor to call the other constable.

In a case on one of the Irish circuits this question appears to have been raised, but was not decided. A constable stated he arrested the prisoner, and told him that any statement or admission would probably be made use of against him. He then left him in the custody of another constable, who alone remained with the prisoner during the night. On the following morning the prisoner made a statement to the witness. The other constable was not produced; and counsel for the prisoner objected on the ground to the statement being given in evidence. Ball J. said, he would not go the length of saying that the statement would not be evidence, but that, in his opinion, such evidence was not, under the circumstances, free from objection; and he recommended it to the crown counsel to endeavor to establish the case by other means. *The Queen v. Courtney*, 2 Crawford & Dix C. C. 63.

SECTION VIII. *A statement not compulsory, made by a party, not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath.*<sup>1</sup>

There are conflicting opinions of Judges *ad nisi prius* on this point, but the proposition appears to be established by high authority.

The principle seems to be, that the party, in his capacity as a witness, might refuse to answer any question that has a tendency to expose him to a criminal charge; any statement therefore which he makes in such character is a free and voluntary statement, and is receivable in evidence. But where his answers are compulsory, and under the peril of punishment for contempt, they are not received. *Regina v. Garbett*, 1 Denison C. C. 236; 2 Carrington & Kirwan, 474; 2 Cox C. C. 448.

In *Wheater's Case*, 2 Moody C. C. 45, 2 Lewin C. C. 157, on an indictment for forging a bill of exchange, depositions of the prisoner had been taken upon oath, before commissioners of bankruptcy, after the prisoner had been charged before the mayor with forging the same bill. The question was, whether these depositions, being upon oath, were admissible against him. The case was tried by Coleridge J., who admitted the depositions, but reserved the question for the Judges. It was argued before the Judges, when all present, except Abinger C. B. and Littledale J., held that the evidence was admissible. And in another case, where a bankrupt had been examined before a commissioner touching some matter irrespective of his trade dealings, and had not objected to answer the questions put, his examination was held to be admissible evidence against him on a subsequent criminal charge. *Regina v. Sloggett*, Dearsly, 656; 7 Cox C. C. 139. A bankrupt, when under examination in a court of bankruptcy, may be compelled, under threat of committal, to answer all questions put to him, touching any matter relating to his trade, dealings, or estate, &c.; and every such answer may afterwards be given in evidence against him in the event of his being prosecuted for any offence against the bankrupt law. *Regina v. Scott*,

<sup>1</sup> It seems scarcely necessary to add that other oral confessions made at other times are competent evidence. *Commonwealth v. Dower*, 4 Allen, 297.

Dearsly & Bell, C. C. 47; 7 Cox C. C. 164. Recognized by Lord Campbell in *Goode v. Job*, 1 Ellis & Ellis, 9; *Regina v. Cross*, Dearsly & Bell C. C. 68; 7 Cox C. C. 226. *Regina v. Robinson*, 1 Law Rep. C. C. 80.

So the answer of the defendant in a suit in equity, instituted against him by the prosecutor, is admissible on an indictment against him. *Regina v. Goldshede*, 1 Carrington & Kirwan, 657. And where the defendant was examined before the grand jury as a witness, on a complaint against another person, and was afterwards himself indicted for that same offence, it was held that his testimony before the grand jury was admissible in evidence against him. *The State v. Broughton*, 7 Iredell, 96.

A difference of opinion existed on this point, as may be gathered from the following cases: In *The Queen v. Owen*, on an indictment for rape and murder, coram Williams J. 9 Carrington & Payne, 83, the prisoners had each made and signed statements on oath, as witnesses at the inquest, and whilst they were in custody as witnesses. These statements were offered in evidence on the part of the prosecution. *Wheater's Case* was not cited, but *Wheeley's Case*, 8 Carrington & Payne, 250, was referred to on the part of the prisoner, where Alderson B. was said to have rejected evidence taken at the inquest, under similar circumstances. Williams J. received the evidence, stating he was aware that Alderson B. had rejected it, but that there was since a reaction of opinion on the point. He offered however to reserve the question, if it should become necessary. It may be observed that Alderson B., who tried *Wheeley's Case*, appears to have been in the next court at this time, and Williams J. had consulted with him in an earlier part of the case. The case went no further, as the prisoners were acquitted.

In *The King v. Mercer*, 2 Starkie N. P. C. 366; 2 Starkie Ev. 39 note, where a magistrate was indicted for a misdemeanor, for misconduct in his office, a statement made by him, upon an examination before a committee of the House of Commons, was held admissible against him. It was objected that the statement was compulsory, and that he would have been subject to a contempt if he had declined to answer. It ought to be observed, though it is not noticed by Mr. Starkie in his work on Evidence, where this case is cited, that when it was mentioned before the Judges in *Rex v. Gilman*, 1 Moody C. C. 203, as having been decided by Abbott C. J. that learned judge observed, that he thought there must be some mistake, and that the evidence must have been given without oath, and before a committee of inquiry, where the witness would not be bound to answer.

In *Tubby's Case*, 5 Carrington & Payne, 530, it was proposed to read an affidavit made by the prisoner at a time when he was not under any suspicion. It was objected to on the ground that a prisoner should not be sworn. Vaughan J. said he had no doubt that it was evidence, as no suspicion attached to the party at the time. "The question is, is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time that he made it." The counsel for the prosecution having read the paper, found it contained nothing material, and withdrew it; there was therefore no decision in the case. In *Wheeler's Case*, already mentioned, *Tubby's Case* was referred to, when Vaughan B., who tried it, observed: "What reason is there for saying that there was any restraint in that case on the person making the statement?" and counsel,

in arguing *Wheater's Case*, in the presence of the same learned judge, said that the ground on which the evidence was admitted in *Tubby's Case* was, that at the time of making the statement the prisoner was not under suspicion.

*Britton's Case*, 1 *Moody & Robinson*, 297, coram *Patteson J.* has been cited by text writers as if it were a decision that conflicted with the proposition above. In *Roscoe's work on the Law of Evidence in Criminal Cases*, it is said that "*Patteson J.* and *Alderson B.* are reported to have held that the balance-sheet of a bankrupt, given on oath, under his commission, is not admissible against him on a criminal charge for concealing his effects;" and *Britton's Case*, 1 *Moody & Robinson*, 297, is referred to in support of this proposition. So *Mr. Phillipps*, referring to the same case, says, "it has been held that the examination of a bankrupt, taken upon oath before commissioners, is not receivable in evidence." 1 *Phillipps Ev.* (8th ed.) 424. And in the first edition of *Greenleaf on Evidence*, vol. 1, p. 226, this case was also cited as a decision. But in the later editions the text has been altered. On referring to that case it will appear that there was no decision to that effect. The bankrupt was indicted for not disclosing his effects under the commission—for not delivering them over, and for concealing them. It was endeavored, but ineffectually, to prove the petitioning creditor's debt; and it was then proposed to offer, in evidence, the traverser's balance-sheet, on the file of proceedings signed by him. It was offered as an admission, by the traverser, of the existence of the debt therein stated. It was objected, that the proceedings under the commission, of which the signing and filing of this balance-sheet was part, could not, in any way, be given in evidence to affect the traverser, until the validity of the commission was established.

A further objection was made by counsel, that the balance-sheet, having been given in upon oath, and the defendant's examination being compulsory, could not be brought forward to affect him criminally, as it was obtained from him under a sort of duress. The *King v. Mercer*, 2 *Starkie N. P. C.* 366, was cited on the part of the prosecution, in answer to this argument. *Patteson J.* consulted with *Alderson B.*, and said he was clearly of opinion that the balance-sheet could not be evidence against the traverser to prove the petitioning creditor's debt.

Thus as above reported, the learned Judges do not appear even to have expressed an opinion, much less to have "held" that a balance-sheet given in by the bankrupt is not admissible against him, on the ground that it is given in upon oath; and accordingly in *Regina v. Wheeler*, 2 *Moody C. C.* 45, when *Britton's Case* was cited before the judge who tried it, he took the opportunity of saying that the ground of that decision was, that the balance-sheet could not be given in evidence unless there was a valid commission; and therefore the balance-sheet being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt, as a part of the commission.

In *Owen's Case*, on an indictment for murder, 9 *Carrington & Payne*, 239,<sup>1</sup> it was proposed, on the part of the prosecution, to give in evidence the depositions of the prisoners taken on oath at the coroner's inquest, held on the body of the deceased, and whilst the prisoners were in custody as witnesses. It was stated to *Gurney B.* who tried the case, that they had been admitted on the previous trial of these prisoners by *Williams J.*, 9 *Carrington & Payne*, 83. The judge is

<sup>1</sup> The prisoners had been tried and acquitted at the previous assizes before *Williams J.* as already cited, for committing a rape upon the same person.

reported to have said, that if the evidence were necessary, and if it is doubtful whether it be receivable in a criminal case, he would receive it, because that is the only way to have the point considered by the Judges, but that he was not aware of any instance in which an examination upon oath, before a coroner or a magistrate, had been admitted against the person making it; and that depositions before magistrates, made by prisoners on oath, had been uniformly rejected. After referring to a case before Coleridge J. where depositions before a commissioner of bankrupt were read in evidence against the prisoner (Wheater's Case; 2 Lewin C. C. 157, ante, confirmed after argument by the Judges) he added: "I confess that I do not, on principle, see the distinction between that and some of the other cases. Still I am of opinion that, in the present case, I ought to reject the evidence." In Lewis's Case, 6 Carrington & Payne, 161, similar evidence was rejected, under the following circumstances: It appeared that on the day on which the prisoner was committed, she and several others were examined on oath, there being at first no specific charge against any person, but, on the conclusion of the examination, the prisoner was committed for trial. It was proposed, on the part of the prosecution, to read the examination. Gurney B. refused to let it be put in, being made by the prisoner at the same time as the depositions, on which she was eventually committed, such examination not being, in his opinion, perfectly voluntary. So in Davis's Case, 6 Carrington & Payne, 177, where the prisoners, father and daughter, were indicted for receiving stolen goods, it appeared that the daughter had been a witness before the magistrate, and it was proposed to ask what she said there, in the presence of her father — the same learned judge refused to admit in evidence any thing she said before the magistrate, where she was a witness; as, after having been a witness, she was made a prisoner. These three cases were all, except the first, previous to Wheeler's Case; and from the manner in which the learned Baron alludes to that case, as being decided by Coleridge J. it would seem that he did not advert, at the time, to the circumstance that it was afterwards confirmed, upon argument, by the Judges. The case of *The King v. Mercer*, ante, does not appear to have been cited in any of the three cases; and although in one of the cases Wheeler's Case was cited, where Alderson B. had refused to receive in evidence the prisoner's depositions made at the inquest and whilst he was in custody, the court was not informed that Alderson B. had changed his opinion upon that point, as stated in Owen's Case, 9 Carrington & Payne, 86, ante. It may be observed, with respect to these three cases, that at the time when the depositions were taken the prisoners were not under charge, as prisoners, of any crime. They were brought forward, though in custody, only as witnesses. As such, they might have refused to answer any question, having a tendency to expose them to a criminal charge. The principle of these decisions has therefore been questioned. See 1 Phillpotts Ev. 425. They appear irreconcilable with the decision of the Judges already mentioned, and with the opinions of other learned Judges in the cases before cited.

SECTION IX. *Where a confession has been obtained, or inducement been held out under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence, unless from the length of time intervening, from proper warning of the consequences, or*

*from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled.*

And in the absence of any such circumstances, the influence of the motives proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will be rejected.

The first of these propositions was adopted almost in these terms in a well considered case in New Jersey in 1828, *The State v. Guild*, 5 Halsted, 163, 179, 181.<sup>1</sup> The second is supported by *The State v. Roberts*, 1 Devereux, 259; *Peter v. The State*, 4 Smedes & Marshall, 31.

The rule is laid down in a well-known work on evidence thus: "Where a confession has once been induced by such means (that is, by any threat or promise) all subsequent admissions of the same or the like facts must be rejected, for they may have resulted from the same influence." 1 Starkie Ev. (ed. 1824) p. 49. The cases however do not support this proposition, and it has been thus qualified: "Where a confession has once been induced by such means, all subsequent admission of the same, or of the like facts, must be rejected, if they have resulted from the same influence." 1 Starkie Ev. (ed. 1842) p. 36. See also the edition of 1833. The true principle is, was the confession so connected with the inducement as to be a *consequence* of it. *The State v. Potter*, 18 Connecticut, 166, 180. And see *Moore v. The Commonwealth*, 2 Leigh, 701.

In Sherrington's Case, 2 Lewin C. C. 123, the overseer of a colliery, at which the prisoner worked, said to him: "There is no doubt thou wilt be found guilty; it will be better for you if you will confess." A constable then came in, and said, to the overseer, in a tone loud enough for the prisoner to hear: "Do not make him any promises." The prisoner then confessed. The overseer, about ten minutes afterwards, delivered the prisoner to the constable of the township. The constable said, when he took the prisoner to his house: "I believe Sherrington has murdered a man in a brutal manner." The wife and brother of the prisoner were present, and said: "What made thee go near the cabin?" The prisoner again confessed. The constable used neither threat nor promise, but did not caution the prisoner. It was about five minutes after he received the prisoner into his charge that he made the statement. He was not aware that the overseer had held out an inducement. The overseer was not present when the statement was made. Patteson J. refused to receive the confession in evidence. As to the first confession, he held that the constable ought to have done something to remove the impression from the prisoner's mind; and that as to the second, there ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession could be received.

The prisoner must be considered to have made the second confession under the same influence as he made the first, the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination.

So where the person to whom the confession is made is a person in inferior authority. Thus in the case of *The King v. Cooper and Wicks*, 5 Carrington &

<sup>1</sup> See the *State v. Brooks*, 1 Vroom, 256, 262. As to the admissibility of the confession of an infant, see ante, vol. I. p. 80.

Payne, 535, the committing magistrate told the prisoner Cooper, whose confession it was proposed to give in evidence, that "if he would make a disclosure he would do all that he could for him." After he was committed, he made a statement to the turnkey of the jail, who held out no inducement to him, but did not give him any caution not to confess. Parke J. would not receive the statement after what the committing magistrate said to the prisoner, more especially as the turnkey did not give him any caution.

In Bell's Case, cited from a MS. case — McNally Ev. 43 — coram Lord Kilwardin C. J. and Carleton C. J., C. P. Mullingar Spring Assizes 1800, a confession had been obtained from the prisoner after his apprehension by his master, and also a magistrate, by menaces and promises. When the prisoner was in jail, the witness, who was also a magistrate, went to him, and the prisoner in his presence signed a written confession. It does not appear that he was cautioned, nor what length of time had elapsed after the former confession. The witness stated that he believed the written confession, taken by him from the prisoner, was given in consequence of the impressions previously made on his mind by his master. The evidence was rejected.

In Richard's Case, 5 Carrington & Payne, 318, on an indictment for administering poison to the prosecutrix, prisoner's mistress, the latter said to the prisoner, a girl of about fifteen years of age, that if she did not tell all about it that night, the constable would be sent for next morning to take her to Stourbridge, meaning before the magistrates. The prisoner then made a statement. Next morning the constable was sent for, and as he was taking the prisoner to the magistrates at Stourbridge, the prisoner, without any inducement having been held out by the constable, made a statement to him. The prisoner's counsel objected to this being received in evidence, as the inducement held out by the prosecutrix must be taken to have continued. Bosanquet J. received it, and held that, as the inducement was, that if she confessed she would not be taken before the magistrates; and as the prisoner must have known, when she made this statement, that the constable was taking her to the magistrates, the inducement was at an end. This is a strong case. It would seem not improbable that the girl was induced to make the statement from the hope that she would thus escape from being taken before the magistrates, her mistress having told her the preceding evening that if she did not then tell all about it she would be sent to the magistrates by a constable, who was accordingly sent for on the next morning.

Where a caution is given by a person in equal or superior authority, the influence is generally considered to have ceased. Thus in Lingate's Case, 1 Phillpotts Ev. 431 (1815) where the prisoner, on being taken into custody, was told by one who came to assist the constable, that it would be better for him to confess, but the committing magistrate cautioned him frequently on the following day to say nothing against himself, Bayley J. held that the confession was clearly admissible. So in Rosier's Case, 1 Phillpotts Ev. 431, MS. (1821) which came before the twelve Judges, a constable told the prisoner he might do himself good by confessing; but the magistrate being asked by the prisoner, said he could not say it would be any benefit. Whereupon the prisoner declined confessing, but confessed afterwards to another constable on his way to prison, and again in prison to another magistrate. The Judges were unani-

mously of opinion, that the confessions were admissible, on the ground that the magistrate's answer was sufficient to efface any previous expectation. So where the prosecutor suggested to the prisoner, that he had better speak out, but the magistrate immediately checked him, and desired the prisoners not to regard him, but to say what was proper. *Edwards's Case*, cited 1 *Phillipps Ev.* (8th ed.) 431. So where an inducement was held out by a magistrate, who was also a clergyman, but the prisoner was cautioned by the coroner, and a letter from the Secretary of State refusing mercy was communicated to the prisoner by the magistrate. The prisoner was acquitted. *Clewes's Case*, 4 *Carrington & Payne*, 225, coram *Littledale J.*

In the case of *Rex v. Bryan*, *Jebb C. C.* 157, it appeared that the prisoner said to a magistrate, when in custody, that he wished to see his priest. The priest on his examination admitted, that observing that the prisoner appeared greatly agitated he said to him: "The evidence at the inquest was so clear against you, there can be no doubt you are the guilty man." The prisoner then stated something to the witness, who thereupon asked the prisoner whether he had any objection to state to the magistrate what he had stated to him? The prisoner said he had not, and the magistrate being called in, the prisoner repeated in his presence what he had stated to the priest. It was objected, that this could not be received in evidence under the foregoing circumstances,<sup>1</sup> whereupon the counsel for the Crown called the magistrate again, who stated, that on the evening of the day on which he had the aforesaid interview with the prisoner, he again saw the prisoner, and cautioned him not to say any thing to him or the police to criminate himself. The magistrate was then allowed to state what the prisoner said to him on this occasion, which appeared to be in every respect the same as what he had stated in the previous interview. The prisoner was convicted. The execution of the sentence was respited, and the opinion of the eleven Judges (*Joy C. B.* being absent) unanimously held that the conviction was right.

In *Howes's Case*, 6 *Carrington & Payne*, 404, the prisoner confessed to two constables who apprehended him, and told him that "two others had split, and he might as well; and that, if he told all, he would be acquitted." The magistrate, hearing the prisoner state, in presence of the constables, that they had held out this inducement, which the constables did not deny, told the prisoner that he need not say any thing unless he pleased; that his confession would do him no good, that he would be committed to prison to take his trial. The prisoner's counsel objected to the confession, made to the magistrate, being received, as he did not seem to have gone to the full extent of telling the prisoner that his former confession would have no effect, and that the law would presume, that the confession before the magistrate was a continuation of the former confession, extorted by the constables; that the statement of the constables acting upon his mind, he would naturally imagine, that it was then too late to retract. 2 *Russell*, 648, and *Sarah Nute's Case* were referred to. *Denman C. J.* received the evidence, it not appearing to him that this statement did result from the same influence as the first, or that the cases cited carried the principle any further. The prisoner was acquitted. It is said in *Phillipps on Evidence*, 430, referring to *Howes's Case*, that "it does not appear to have been decided in England whether

<sup>1</sup> *Quære?*—See *Gilham's Case*, *ante*. It does not appear that the priest held out any inducement.

generally a caution by a person will make a confession to him admissible, notwithstanding a previous inducement by himself."

This question seems to have been raised and decided in an American case, the circumstances of which were these: a magistrate told the prisoner's wife "that if what she said to him was true, her husband had better confess. He held out no inducement to fear or favor, other than was implied in these words. The prisoner was then in custody, but not in the room in which the magistrate used these words. The wife then asked the witness, Can we put confidence in him? Witness said: 'You may confide in the magistrate.' On the next morning the same magistrate took the examination of the prisoner, and told him that nothing he had said before should induce him to expect any favor; but that he (the magistrate) had all the facts, and it would be better to tell them truly, for if he did not he would detect him in a falsehood. He then examined him in the usual manner. The court held, that the confession was, under these circumstances, inadmissible—that this was holding out an expectation of favor, inconsistent with the free and voluntary spirit in which a confession should be made—that the mind of the prisoner was unduly influenced by what was said to him; and that it did not alter the case, that the examination was not taken until the next morning—that the influence continued to exist throughout the night, and could not be fairly supposed to be removed by what was said to him at that time. This was given as the judgment of the court, which, from the language used in the report, seems to have consisted of more judges than one. It may be questioned whether this case could be followed in England consistently with the principle of the cases already cited. *The People v. Robertson*, 1 Wheeler C. C. 67.

It is stated in 1 Phillipps on Evidence (p. 430) that "where an inducement has been held out by a prosecutor, or by a person in authority, it would seem, in general, that a subsequent confession to such persons would not be receivable." The learned writer cites in support of this proposition, *Nute's Case* and *Sexton's Case* and 2 East P. C. 658; but in *Nute's Case*, as reported in Russell, the confession tendered in evidence was made to another, and not to the same person who held out the inducement, and to whom the first confession had been made. The jury rejected it, being of opinion that it was under the influence of having made the first confession. The passage cited from East, states generally, that "where a prisoner has been once induced to confess, upon a promise or threat, it is the common practice to reject any subsequent confession of the same or like facts, though at a subsequent time." No distinction appears to be made here between a confession to the same person who holds out the inducement and a confession to another person. So in *Sexton's Case*, the confession, which Best J. refused to receive, was not made to the officer who held out the inducement, but subsequently to a magistrate, a third person, in the presence of the officer. Best J. said in that case, that if the magistrate had told the prisoner that what he had already said to the officer could not be given in evidence against him, that his statement to the magistrate, who had duly cautioned him, would be admissible. As to the authority of *Sexton's Case*, see ante Section II.

SECTION X. *A confession may be inferred from the conduct and demeanor of a prisoner, when a statement is made in his presence, affecting himself, unless such statement is made in the deposition of a witness, or examination of another prisoner, before a magistrate.*



The cases upon this point proceed upon the maxim, *Qui tacet consentire videtur*.

In *Bartlett's Case*, 7 *Carrington & Payne*, 832, the prisoner's wife in his presence, and whilst he was in custody on a charge of murder, said to the prisoner: "O Bartlett! how could you do it?" he looked at her and said, "Ah! what? you accuse me of the murder too!" She said: "I do, you are the man that shot my mother." The prisoner made no reply. She then turned to the witness and said: "This is done for money." The prisoner's counsel objected that as the wife could not be examined on oath against the prisoner, what she said could not be used in evidence against him. Bolland B. said he had no doubt the evidence was admissible. The prisoner was convicted. In *Smithies's Case*, 5 *Carrington & Payne*, 332, on an indictment for arson, the prisoner's wife made some observations to the prisoner, on the subject of the fire, to which he made an evasive reply. The prisoner's counsel objected to these observations being admitted, as he was instructed, that the wife was now in court, and if she could be by law examined, would directly contradict the proposed statements. Gaselee J. and Parke J. were both of opinion, that the statement was admissible; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as evidence of an implied admission on his part. The prisoner was found guilty.

In Massachusetts this principle has recently been discussed in the case of *Commonwealth v. Kenney*, 12 *Metcalf*, 235 (1847). In this case a witness testified that he was in one of the watch-houses in Boston, between eleven and twelve o'clock in the evening of September 5th, 1846, and that while he was there two of the watchmen of the city, having the defendant in custody, came in; that one of the watchmen said: "Here is a man that has been robbing a man;" that presently Russell, the person named in the indictment as having been robbed, came in crying, and said: "That man," pointing to the defendant, "has stolen my money;" that the other watchman, named Baxter, made a search of the defendant's person, but found nothing, and was proceeding to lock him up in the cellar; that as the defendant was going down cellar, the witness saw him put his hands up, turn himself, and shove something between a water-bucket and a little earthen pot, that stood on a shelf built up in the corner of the watch-house; that the witness then got up from his seat, looked at the place where the defendant had put his hands, and saw a bag, which he took up, and thereupon said: "Here is the bag;" the defendant then being on the stairs, going down cellar, and within hearing; that Russell immediately said: "That is my bag;" that Baxter then took the bag, and counted the money in it; and that while Baxter was counting the money—the defendant then standing in the watch-house—Russell said: "That was all the money I had in the world;" and that the defendant made no reply to any of the aforesaid declarations. Shaw C. J. in delivering the opinion of the court, said: "But on another ground we take a different view of the admissibility of the evidence, depending on the question whether the statements of Russell in the hearing of the defendant, and the silence of the latter, do amount to a tacit admission of the facts stated. It depends on this: If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and

the reply are both admissible; the reply, because it is the act of the party, who will not be presumed to admit any thing affecting his own interest or his own rights unless compelled to do it by the force of truth; and the declaration, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it.<sup>1</sup> If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in the present case he has reported the facts, on which the competency of the evidence depended, and submitted it, as a question of law, to this court. The circumstances were such, that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watch-house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence) was made whilst he was under arrest, and in the custody of persons having official authority. They were made, by an excited, complaining party, to such officers who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say any thing until regularly called upon to answer. We are therefore of opinion that the verdict must be set aside and a new trial granted." In *Commonwealth v. Walker*, 13 Allen, 570, the facts were almost precisely identical with those disclosed in *Commonwealth v. Kenney*. And it was held that the defendant was not bound to deny or reply to the statements made in his presence, and his silence warranted no inference against him.

In *Commonwealth v. Call*, 21 Pickering, 515, 521, it was held that confessions of an accomplice made in the presence of the defendant, and assented to by him, are admissible in evidence against him. Morton J. said: "Although the confessions of an accomplice, as such, are not competent evidence; 1 Phillips Ev. 87; Kelyng, 18; Gilbert Ev. 124, yet when made in the presence of the defendant, and assented to by him, there can be no doubt of their admissibility. Indeed, had his express assent been wanting, they would have been admissible. Where declarations against a party are made in the presence and not objected to by him, he being at liberty to do so, his assent is implied, and they are always deemed competent evidence."

<sup>1</sup> *Commonwealth v. Galavan*, 9 Allen, 271.

The qualification of the above proposition, or exception to it, includes those cases where the deposition of a witness or examination of another prisoner before a magistrate, in presence of the prisoner, contains some statement affecting the prisoner. Such statement seems, according to the best authorities, not to be admissible in evidence, even as an implied admission. Thus in *Rex v. Turner*, which came before the Judges on another point, 1 Moody C. C. 347, it was proposed to prove a confession of a female prisoner, made before a magistrate in the presence of another prisoner, in which various facts were stated, implicating the other as well as herself. Patteson J. refused to receive this in evidence.<sup>1</sup>

In *Melen v. Andrews, Moody & Malkin*, 336, in an action on the case, for maliciously laying an information before magistrates, under the stat. 7 & 8 Geo. IV. ch. 30, it appeared that the plaintiff had cross-examined the defendant Andrews before the magistrates, and had commented upon his evidence. The defendant's counsel then proposed to inquire of the witness, what another party examined on that occasion, but not a party to the record in this case, had stated, on the ground that it was said in the plaintiff's presence; and that he had the opportunity of cross-examining the witness, and observing upon his testimony, and had used that privilege, in reference to the defendant Andrews. Parke J. refused to admit the evidence; observing, that "the deposition of a witness, taken in a judicial proceeding, is not evidence, although the party, against whom it is sought to be read, was present, and had the opportunity of cross-examining; and that in an investigation of this nature, there is a regularity of proceeding adopted, which prevents the party from interposing, when and how he pleases, as he would in a common conversation; that the same inference therefore could not be drawn from his silence, or his conduct in this case, which generally may in that of a conversation in his presence, and that it was only for the sake of these inferences that the conversation can ever be admitted." So in *Appleby's Case*, 3 Starkie N. P. C. 33, where it was proposed to show, that when the prisoners were taken and examined before a magistrate, one of them, being charged by the examination of another, did not deny the charge. Holroyd J. refused to receive the evidence, and said, that it had been so ruled by several of the Judges in a similar case, which had been tried at Chester.

The case of *Rex v. Edmunds, 6 Carrington & Payne*, 164, before Tindal C. J. has been considered at variance with the above authorities.<sup>2</sup> The prisoner was charged with murder a few days after the night on which the blow was given; the deceased made a complaint before a clergyman, and the prisoner was, in consequence, brought before two magistrates on a charge of assault; one of the magistrates stated, that on the examination of this latter charge, the deceased made a statement, and the prisoner made a statement in answer to it. Neither of these statements was reduced into writing, as the case was one of summary conviction. The prisoner was convicted by the magistrates. Tindal C. J. admitted in evidence what the deceased and the prisoner said upon this examination; the learned judge said: "I shall not however hold that what the deceased said is evidence, as proving the facts he stated, as it would be if it were a deposition taken under the statute 7 Geo. IV. ch. 64; but only evidence, as

<sup>1</sup> See *Regina v. Newman*, 1 Ellis & Blackburn, 268; 3 Carrington & Kirwan, 252; 1 Taylor Ev. § 828.

<sup>2</sup> "But, as it should seem, without any sufficient reason." 3 Russell on Crimes, 424 note. 4th ed.

producing an answer from the prisoner, like any other conversation; and I do not think it is the less evidence, because it is upon oath. I shall therefore admit it as a conversation. The prisoner was found guilty of manslaughter. Mr. Phillipp observes, that "this case seems of doubtful authority;" it may be remarked, that although the prisoner's counsel objected on another ground, the attention of the court does not appear to have been called to this objection, that the statement was made on an examination before a magistrate, which has been considered as preventing a prisoner from interposing at his will and pleasure, and therefore as shutting out any inference to be drawn from his silence. Phillipp on Evidence (8th ed.) 423.

SECTION XI. *Where a confession is not admissible, from the circumstances under which it was obtained, contemporaneous declarations of the party are receivable in evidence or not according to the attending circumstances, but any act of such party, though done in consequence of such confession, is admissible in evidence, if it appears from a fact thereby discovered, that so much of the confession as immediately relates to it, is true.*

In Warickshall's Case, 1 Leach C. C. (4th ed.) 263, Old Bailey Sessions, 1783, coram Nares J. and Eyre B. where the confession was rejected as made under promises of favor, the fact that part of the stolen property was obtained through means of the confession, was admitted. It was objected, that to receive it was to make the prisoner the deluded instrument of her own conviction, and to violate the faith which the prosecutor had pledged. The court said, it was a mistaken notion, that the evidence of confessions and facts, obtained from prisoners by promises and threats, was to be rejected from a regard to public faith; that no such rule ever prevailed, that the idea was novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law.

Confessions are received in evidence or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.<sup>1</sup> This principle respecting confessions has no application whatever to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained however must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confes-

<sup>1</sup> Three men were tried and convicted for the murder of Mr. Harrison of Campden in Gloucestershire. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession therefore was not given in evidence against him, and a few years afterwards it appeared, that Mr. Harrison was alive. 1 Leach C. C. 264 (4th ed.) MSS. case.

sion, as a proof of the fact, clearly shows that the fact may be admitted on other evidence, for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not (see *Gould's Case*, post); and the consequences to public justice would be dangerous indeed; for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other. It is true, that many able Judges have conceived, that it would be an exceedingly hard case, that a man whose life is at stake, having been lulled into a notion of security by promises of favor, and who, in consequence of those promises, has been induced to make a confession, by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate against him. But this subject has more than once undergone the solemn consideration of the twelve Judges; and a majority of them were clearly of opinion, that although confessions, improperly obtained, cannot be received in evidence, yet that any acts done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. 1 Leach C. C. 264 (4th ed.).

In *Gould's Case*, 9 *Carrington & Payne*, 364, a statement had been made by the prisoner, under circumstances which induced the prosecution, with the approbation of the court, not to offer it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked, whether, in consequence of something which the prisoner had said, he made search for the lantern? *Tindal C. J.* and *Parke B.* received the words used by the prisoner, with reference to the thing found, but not the other parts of the statements received. The prisoner was found guilty.

In *Rex v. Harris*, 1 *Moody C. C.* 338, on an indictment for killing a sheep, with intent to steal the carcase, where the admissibility of a confession was reserved by *Littledale J.* for the opinion of the Judges, the judge admitted in evidence the facts, that, after this statement, the prisoner went with two persons to a field, and said "he could find the skin buried;" that he showed them the place; that they dug it up, and that it was the skin of the sheep which had been lost. In *Thurtell's Case*, cited by *Mr. Alison*, in his work on the Criminal Law of Scotland, vol. 2, 584, although a confession obtained, by means of promises or hopes of impunity held out, was not used in evidence against him, yet, the fact that goods were recovered or a corpse found, in consequence of the confession, and at the place mentioned in the confession, was held receivable in evidence. In *Commonwealth v. Knapp*, 9 *Pickering*, 496, 511, where the prisoner's confessions were excluded, as having been improperly obtained, a witness was allowed to testify, that a weapon used in the commission of the murder, was found by him in a particular place, and that he was directed to the place by the prisoner. *Commonwealth v. James*, 99 *Massachusetts*, 439.

The reason for excluding a confession is to guard against the possibility of an innocent person being from weakness seduced untruly to accuse himself, in hopes of thereby obtaining more favor, or from fear of meeting with more punish-

ment; that reason is done away, if such confession be substantiated by an actual finding of the goods accordingly, in the place described, which would not probably be known to the party, if he were not privy to the felony. 2 East P. C. 658.

In *Mosey's Case*, 1 Leach C. C. (4th ed.) 265 note, a confession was made, and goods found in consequence of it. Buller J. (present Eyre B.) said: "Whatever acts are done, are evidence; but if those acts are not sufficient to make out the charge against the prisoner, the conversation on confession of the prisoner cannot be received, so as to couple it with those acts, in order to make out the subject-matter of proof. A prisoner was tried before me, where the evidence was just as it is here; I stopped all the witnesses when they came to the confession; the prisoner was acquitted. There were two learned Judges on the bench, who told me, that although what the prisoner said was not evidence, yet, that any facts arising afterwards, must be received; this point, though it did not affect the prisoner at the bar, was stated to all the Judges; and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done afterwards may be given in evidence, although they were done in consequence of the confession." See also *Lockhart's Case*, 1 Leach C. C. (4th ed.) 386. But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is, that the prisoner may have been thereby induced to say what is false, but the fact discovered shows, that so much of the confession as immediately relates to it is true. *Rex v. Butcher*, 1 Leach C. C. (4th ed.) 265 note.

In *Cain's Case*, 1 Crawford & Dix C. C. 37,<sup>1</sup> where an admission of a female prisoner to a constable that the child (for concealing whose birth she was indicted) was in the bedstead, was rejected on the ground that the witness had interrogated the prisoner in a threatening manner, *Torrens J.* admitted evidence of the acts: the search for and the finding of the child in the bedstead, which were done in consequence of the admission.

In *Rex v. Griffin*, Russell & Ryan C. C. 151, the prisoner was indicted and convicted of stealing a guinea and two promissory notes, in a dwelling-house. One of the notes was a Bank of England note for £5, the other a Reading bank-note for the same sum. The prosecutor, after detailing a conversation with the prisoner, was proceeding to state a confession, but as he admitted that he had told the prisoner it would be better for him to confess, *Chambre J.* stopped him, but permitted him to prove "that the prisoner brought to him a guinea and a £5 Reading bank-note, which he gave up to the prosecutor, as the

<sup>1</sup> The constable went to the prisoner's house, and said: "Where is your child?" The prisoner replied: "I have no child." Witness then said: "I have received information that you were delivered of a child." The prisoner persisted in denial, when the witness said, "I shall search for the child, so you had better tell me where it is." The prisoner then said, the child was in the bedstead, and the witness, upon search, found it there. The confession was not admitted. It does not appear from the report that the question was argued; there was a subsequent confession by the prisoner to another person, which was admitted in evidence. It would seem, that a threat to search for the child was not calculated to induce the prisoner untruly to confess herself guilty, which is the test of its admissibility (*ante* Section I.); while, on the other hand, the confession naturally led to her immediate apprehension.

guinea and one of the notes that had been stolen from him." The judge told the jury, that notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence that it was the stolen note. In Easter term 1809 a majority of the Judges, namely, Lord Ellenborough, Mansfield C. J., Macdonald C. B., Heath J., Grose J., Chambre J. and Wood B. held the conviction right, and the evidence admissible. Lawrence and Le Blanc JJ. were of a contrary opinion. Le Blanc J. was of opinion, that the production of the money by the prisoner was alone admissible, and not his saying at the time he produced one of the notes, "that it was one of the notes stolen from the prosecutor." The remark of the court in *Rex v. Jenkins, Russell & Ryan C. C. 492*, "that the influence which might produce a groundless confession, might also produce groundless conduct," seems applicable to the circumstances of this case. The money produced however corresponded in amount and in general character with that taken from the prosecutor, and the statement identifying it was contemporaneous with the fact of the production of the money. It was not a confession of the prisoner's guilt, but an identification of the property which had been taken from the prosecutor.

In *Rex v. Jones, Russell & Ryan C. C. 152*, which came before the twelve Judges on the same day as *Rex v. Griffin*, the prosecutor, with others, had been in pursuit of the prisoner, having found him in custody of a constable, to whom he had been delivered by a sergeant of marines, asked the prisoner for the money that he had taken out of his pack, upon which the prisoner took 11s. 6½d. out of his pocket, and said that was all that was left of it. The sergeant gave the same account, but added, that before the prisoner produced the money, the prosecutor said "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased." Chambre J. left the whole of this evidence to the jury, who found the prisoner guilty. In Easter term 1809 the majority of the Judges present, namely, Macdonald C. B., Chambre, Lawrence, Le Blanc, and Heath JJ. held the evidence inadmissible and conviction wrong. Mansfield C. J., Wood B., Grose J. contra. Lord Ellenborough dubitante. The case of *Rex v. Jones* was acted upon by Vaughan B. who rejected evidence offered under precisely similar circumstances in *Clarke's Case, MSS. 1828*, cited by Mr. Carrington in his *Supplement to the Treatises on Criminal Law*.

In *Rex v. Jenkins, Russell & Ryan C. C. 492*, the case was tried and the prisoner convicted, before Bayley J. and Parke J. at the Old Bailey Sessions, Michaelmas 1822. The prisoner was induced, by a promise from the prosecutor, to confess his guilt, and after that confession, he carried the officers to a particular house, as the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person denied knowing any thing about it, and the property was never found. The evidence of the confession was not received; the evidence of his carrying the officer to the house was. Bayley J. stated the case for the consideration of the Judges; they held the evidence inadmissible, and the conviction wrong. The confession was excluded, because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence, which might produce a groundless confession, might also produce groundless conduct.

In this case, there appears to have been nothing to confirm either the prisoner's statement or his conduct.

In Harvey's Case, 2 East P. C. 658 (Bodmin Summer Assizes 1800) Lord Eldon said, that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and the judge so directed the jury in that case.

SECTION XII. *Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible, although such statement neither appears in the written examination, nor is vouched by the magistrate; and a confession before a magistrate is admissible, although it was made before the evidence of the witnesses against the parties was concluded.*

The first part of this proposition seems warranted by a case before the Judges, next cited, but it has been remarked, that such parol statements are liable to considerable suspicion from the very circumstance of their not having been taken down by the magistrate, and that they ought therefore to be received with the greatest caution. 1 Phillipps Ev. 447.

In the case of *Rex v. Harris*, 1 Moody C. C. 338 (1832) cited ante on another point, the prisoners were tried before Littledale J. for killing a ewe, the property of Thomas Bennet, with intent to steal the carcase. There was a second count for stealing the ewe. The prisoners, in consequence of a statement made by Butler to one Robinson, were taken before a magistrate, who stated in his evidence at the trial "that the examination produced was all that was taken down, that was what each of the prisoners said, it was all in the handwriting of the witness, the examinations were read over to the prisoners, and were signed by all three, and that he had taken down every thing said by them that he heard, and that the papers produced contained every thing, as he believed, that transpired before him. The room was very full." The papers produced were the depositions of the three prisoners, and the examination and confession of Butler, as to each offence, and the examinations of the other two prisoners, which latter were silent as to Bennet's sheep altogether. These examinations were signed by the two prisoners, as marksmen, respectively. Robinson was present during the examinations, and stated, that Harris said to the magistrate, he was connected with the taking of Bennet's sheep, and that Harris said further, that "they took a neddy out of the road and put the sheep upon him, and the neddy tumbled," and that these words were addressed to the magistrate. That Evans also said, "he helped to take Bennet's sheep," and that he addressed himself, in saying so, to the magistrate. Bennet, one of the prosecutors, said he was at the magistrate's, that he heard Harris and Evans, that Harris said he helped to take Bennet's ewe, and that Evans, after he had been admonished by his fellow-prisoner Harris to speak the truth, said, "he helped to do it, he helped to take his (Bennet's) sheep," and that what both said was addressed to the magistrate.

It does not appear that there was any evidence against either of the prisoners, Evans or Harris, as to Bennet's sheep, the subject of the indictment, except this parol evidence of confession before the magistrate. It was objected, that as Harris and Evans had made a confession, which had been taken down in



writing by the magistrate, a confession as to Bennet's sheep, could not be supplied by parol evidence; that parol evidence could not under the circumstances be admitted of any thing else that was addressed to the magistrate. The prisoners were all found guilty, and the opinion of the Judges was requested, whether the parol evidence of Robinson and Bennet as to what passed before the magistrate was admissible. All the Judges (except Lord Lyndhurst C. B., Bosanquet J., Taunton J. and Gurney B. who were absent) were unanimously of opinion that the evidence, being precise and distinct, was properly received, and that the conviction was right. See 3 Russell on Crimes (4th ed.) 451, note by Mr. Greaves; 1 Greenl. Ev. (7th ed.) § 227 note.

Malony's Case, upon this point, was previous to Harris's Case before the Judges, the former being in 1831, the latter in 1832. Littledale J. who tried the former on circuit, concurred with the decision of the Judges in the latter. That decision was unanimous. The former case does not appear to be reported; it is thus briefly mentioned in Matthew's Digest of Criminal Law published in 1833: "But if an observation made by the prisoner ought to have been taken down in writing, and was not, it is inadmissible." *Rex v. Mulvey*, per Littledale J. Lancaster Spring Assizes 1831, MS." This is copied by Roscoe, without any other reference, and it is miscalled Molony's Case. See 1 Greenl. Ev. (7th ed.) § 227 note.

In *Rex v. Spilsbury*, 7 Carrington & Payne, 188, Coleridge J. admitted parol evidence of a statement made by the prisoner before the magistrate, in the course of the examination of one of the witnesses, but not forming part of what the prisoner said when he was called on for his defence. The judge observed, that "as that would not be put down as a part of the statement of the prisoner, he was clearly of opinion that it was receivable; that if the prisoner, being asked at the close of the evidence for the prosecution, does say something, it is taken down, and the evidence of that statement is the written deposition, but if a prisoner says any thing while the witnesses are under examination, that does not stand on the same ground."

In *Rowland v. Ashby*, Ryan & Moody N. P. C. 231, at Guildhall, March 1825, coram Best C. J., it was proposed to give in evidence an admission by the plaintiff on his examination before commissioners of bankrupt, that he was in partnership with his son. There was no such admission in the written examination produced. It was objected that the evidence was inadmissible, the case being the same as the examination of a prisoner before a magistrate; that it must be presumed the commissioners had done their duty and had made a faithful account of the plaintiff's evidence. Best C. J. admitted the evidence, and said that in regard to the statute for examination of prisoners by a magistrate, it had been used for a different purpose than had been intended; and that his opinion was that upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by the committing magistrate.

It seems that the object of the old statute of Philip and Mary, requiring the examination of prisoners to be taken, was to enable the judge and jury to see whether the witnesses were consistent or contradictory in the evidence they gave. Grose J. in *Lamb's Case*, 2 Leach C. C. 552 (4th ed.) says, that the only object of the legislature in enabling the magistrate to take informations was to enable the judge and jury before whom the prisoner is tried, to see whether the offence

is bailable, and whether the witnesses are consistent or contradictory in the evidence they give. There is not a single expression from which it is to be collected that the examination was directed to be taken merely as evidence against the prisoner; nor indeed is the examination ever given in evidence as a matter so required by the statute; but containing a detail of circumstances taken under the solemnity of a public examination for a different purpose, it is more authentic, on account of the deliberate manner in which it is taken, and when it contains a confession it is admitted, not by force of the statute, but by the common law, as strong evidence of that fact.<sup>1</sup>

In 1 Greenl. Ev. § 227, it is said that “the law *conclusively presumes*, that if any thing was taken down in writing, the magistrate performed all his duty by taking down all that was material. In such case, no parol evidence of what the prisoner may have said on that occasion can be received.” In a note, the learned author says: “Mr. Joy in his Treatise on Confessions, pp. 89–92, 237, dissents from this proposition, so far as regards the *conclusive* character of the presumption, which, he thinks, is neither ‘supported by the authorities,’ nor ‘reconcilable with the object with which examinations are taken.’ But upon a careful review of the authorities, and with deference to the opinion of that learned writer, I am constrained to leave the text unaltered.”

In respect of the second branch of the proposition above, that it is not necessary, in order to make a confession admissible, that the prisoner should be first put in possession of all the evidence against him; it was so held in Bell’s Case, 5 Carrington & Payne, 163, coram Gaselee J. who conferred with Lord Tenterden C. J. on the case, where several depositions were taken in the prisoner’s presence, both on the day on which the confession was made and on a previous day, and other depositions were taken on a day subsequent to that on which the

<sup>1</sup> In Lewis’s Case, 6 Carrington & Payne, 162, Gurney B. refused to receive parol evidence of something said by the prisoner, not taken down in the depositions which he made as a witness before the magistrate. The depositions had been rejected, on the ground that they were not voluntary. This would apply to the statement not taken down as well as that which was. Mr. Phillipp’s, 446 note 4, speaks of this as a case in which the judge refused to receive similar evidence to that which was received in Harris’s Case, ante 223: but the latter was the case of an examination not upon oath.

In Walter’s Case, 7 Carrington & Payne, 267, it was stated on the depositions returned by the magistrate that the prisoner declined to say any thing; Lord Abinger C. J. was of opinion that, under these circumstances, parol evidence was not admissible of a confession of the prisoner alleged to have been made on his examination; but the point was not decided, the other evidence in the case being sufficient. The prisoner was found guilty. In this case the parol evidence proposed to be given would have directly contradicted the return made by the magistrates; but the circumstance of some part of the prisoner’s statement being omitted by the magistrate, would not, it seems, render the examination inadmissible, if it has been read over to the party, and he has not dissented from its correctness. Thus in a civil suit, Milward v. Forbes, 4 Espinasse N. P. C. 170, the examination of the defendant before commissioners of bankrupt was tendered in evidence against him in an action of trover. It was proved that the defendant had said more on the examination than was taken down, that the commissioner had taken down only what he considered relevant,—but that nothing relevant was omitted, whether it made for or against the party, and the examination was read to the defendant before he signed it. Lord Ellenborough C. J. held, that the party having signed it, after he heard it so stated from his own words, and read over to him before he signed it, it must be taken to be a statement of facts admitted by him, and it was therefore evidence.

prisoner confessed, some in his presence, others in his absence. Lord Tenterden C. J. and Gaselee J. agreed that the opinion of Garrow B. in *Flagg's Case*, was much too general, as it would go to exclude any acknowledgment of guilt made by a prisoner to a constable.

In this latter case (4 *Carrington & Payne*, 567) Garrow B. admitted the evidence, but expressed a doubt as to its legality. He thought that nothing said by a prisoner, before he knew what evidence was against him, ought to be used to criminate him; and he censured the practice of taking such a statement from a prisoner, who ought only to be asked whether he wished to say any thing in answer to the charge, when he had heard all that the witnesses in support of it had to say against him.

**SECTION XIII.** *Parol evidence of a confession made during an examination before a magistrate, is admissible in evidence, although it was taken down in writing by the magistrate, if from informality the written examination is not admissible; and such examination, though informal, may be used to refresh the memory of a witness who was present and took it down.*

This proposition strictly belongs to the subject of secondary evidence. It is however immediately connected with the subject in discussion.

*Telicote's Case*, 2 Starkie N. P. C. 483; *Foster's Case*, 1 Lewin C. C. 46; *Hirst's Case*, 1 Lewin C. C. 46; and *Pressly's Case*, 6 *Carrington & Payne*, 183, are instances of the admissibility of such parol evidence, where the examinations are not signed by the prisoner. In *Tarrant's Case*, 6 *Carrington & Payne*, 182, where it did not appear on the face of the examination, that it was taken on a charge of felony, or that the magistrates who signed it were then acting as such, *Patteson J.* allowed the clerk to the magistrates to refresh his memory from the paper. In *Bell's Case*, 5 *Carrington & Payne*, 162, the confession had been taken down in writing by the magistrate's clerk; the prisoner, after it was read over to him, put his mark to it. The clerk attested it thus: "Taken and signed by the said John H. Bell, in the presence of." The prisoner's counsel objected to the admissibility of this document, on the ground that there was a false attestation. *Gaselee J.* after consulting Lord Tenterden C. J. said, they were both of opinion that the confession might be repeated by the magistrate's clerk, who heard it, and that he might refresh his memory by aid of the written paper. The prisoner was convicted. The same course was pursued in *Jones's Case*, *Carrington Suppl.* 13; *Watkins's Case*, 4 *Carrington & Payne*, 550 note b; and *Reed's Case*, *Moody & Malkin*, 403. It does not appear what the irregularity in the examination was. See a case before Lord Lyndhurst, referred to, 5 *Carrington & Payne*, 164 note. In *Pressly's Case*, 6 *Carrington & Payne*, 183, *Patteson J.* said, he thought it would be the more safe course that the examination itself should not be read. The clerk to the magistrates, by whom it was taken, was allowed to refresh his memory from it. In *Lambe's Case*, 2 *Leach C. C.* (4th ed.) 552, which came before the twelve Judges, the examination, which had been read over to the prisoner, but was not signed either by him or by the magistrate, was received per se as a paper writing, but not as an official document. In *Thomas's Case*, 2 *Leach C. C.* (4th ed.) 637, minutes taken by the solicitor for the prosecution, on the examination of the prisoner before a magistrate, and at the instance of a magistrate, were admitted in evidence, though they were not signed either

by the magistrate or the prisoner. The prisoner's counsel attempted to distinguish that case from *Lambe's Case*, on the ground that, in the latter case, the prisoner had acknowledged before the magistrate that the contents of the examination were true, although he refused to sign it, whereas in the present case the prisoner refused to sign the examination, because part of it, he said, was not true. The court had no doubt that these minutes might be read in evidence, and said, that in *Lambe's Case* the Judges were of opinion, that if such written examination were to be adjudged not admissible, this monstrous proposition would follow, that whatever a prisoner says, when not before a magistrate, would be admissible, though depending on the faculty of memory; but that the moment a prisoner gets before a magistrate, it would not be admissible, though taken down in writing, under circumstances of the greatest caution and solemnity.<sup>1</sup>

It may be remarked here, that a parol confession is admissible in evidence, although it appears that a confession was made subsequently to a magistrate, which was taken down in writing, and which is not produced in evidence. Thus in *Carty's Case*, *Ridgeway's Report*, 73, at a commission of Oyer and Terminer at Dublin, 37 Geo. III. coram Boyd J. and Downes J. cited *MacNally Ev.* 45; 1 *Phillipps Ev.* (8th ed.) 446, it was proposed to give in evidence a private conversation between the last (the prosecutor) and the prisoner after he was committed to jail. A declaration or confession of the prisoner had been subsequently taken in writing, on an examination by a magistrate. At the time of the conversation in question, no certain information had been given, or was in contemplation by the prisoner. The witness stated, that the evidence before the magistrate was taken about a fortnight after the prisoner was committed, and was taken in the presence of the witness, but not by him; that he believed it was still in existence; but that the conversation which he had with the prisoner, and which he proposed to detail, happened about a fortnight before the taking of such written confession. It was then urged, on behalf of the prisoner, that the witness spoke from memory only; that such evidence might err; that written evidence could not, and was therefore the only proper evidence of the confession. The parol evidence was admitted. The court had no doubt as to its admissibility.

It is presumed, unless the contrary is proved, that the magistrate has taken down the prisoner's examination in writing, where the statute requires him so to do; and therefore, in order to render parol evidence admissible, it must be proved that such examination was not reduced into writing.

In *Jacobs's Case*, 1 *Leach C. C.* (4th ed.) 310, Gould J. said, referring to the old statutes, justices of peace, when any prisoner is brought before them on a charge of felony, shall take the examination of the said prisoner, and the information of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as may be necessary to prove the felony, shall be put in writing within two days after the examination, and certified to the next gen-

<sup>1</sup> Where the prisoner's examination is produced, it is admissible in evidence, without calling either the magistrate, before whom, or the clerk, by whom, it was taken down. See *Hopes's Case*, 7 *Carrington & Payne*, 186; *Taylor's Case*, *Ibid.* 138; *Foster's Case*, *Ibid.* 148; *Rees's Case*, *Ibid.* 668; *Reading's Case*, 7 *Carrington & Payne*, 649; *Pikesley's Case*, 9 *Carrington & Payne*, 124; *Hearne's Case*, *Carrington & Marshman*, 109; *Wilshaw's Case*, *Ibid.* 146.

eral jail delivery. The statutes do not leave this matter to the option of the magistrate, but they say that he shall do it; and, whatever may have crept into practice, the directions of this law ought not to be dispensed with. The rule of law is the compass by which the court ought to be guided. What a prisoner says in other places may undoubtedly be received upon *viva voce* testimony; but as the law requires that his examination before the magistrates shall be reduced into writing, and returned to the court, the particulars of such examination cannot be given in evidence *viva voce*, unless it be clearly proved that in fact such examination never was reduced into writing. The same was held by Ashhurst J. in *Hinxman's Case*; and by Heath J. in *Fisher's Case*, 1 Leach C. C. (4th ed.) 310, 311 note.

It may be remarked here, that a confession made by a prisoner is not, according to present rules, allowed to be received in evidence for the purpose of criminalizing any one but himself. This principle of English law was established by a resolution of the Judges in *Tong's Case*, Kelyng, 17, 18, early in the reign of Charles II.; and, like the rule requiring witnesses to be examined in open court, appears to have been one of the judicial reforms owing their origin to the Commonwealth. See the *Great Oyer of Poisoning*, by Andrew Amos, Esq. p. 296. So a confession of a principal felon is not admissible against an accessory. The question arose in *Turner's Case*, and was reserved by Patteson J. for the Judges. All the Judges met, except Lord Lyndhurst C. B. and Taunton J., and were unanimously of opinion that the confession of the person who stole the goods was not evidence against the receiver, and that the conviction was wrong. 1 Moody C. C. 347. The principal felon was still alive, but the decision did not turn upon this circumstance.

Where a confession affects in its terms other prisoners, and implicates them by name, the judge will tell the jury that the confession does not legally affect any one but the person who made it; but the confession must be proved as it was made, and the names of all implicated by it must be mentioned. *Foster's Case*, coram Lord Denman C. J. 1 Lewin C. C. 110. *Hearne's Case*, 4 Carrington & Payne, 215. *Clewes's Case*, Ibid. 225. *Hall's Case*, coram Alderson J. 1 Lewin C. C. 110. *Fletcher's Case*, coram Littledale J. Ibid. 107. *Walkley's Case*, 6 Carrington & Payne, 175. *Commonwealth v. Ingraham*, 7 Gray, 46. See 1 Lewin C. C. 110, *Barstow's Case*, where Parke J. though *Fletcher's Case* was cited, held *contrà*. It is believed however that juries are not much influenced by cautions regarding the legitimate bearing of evidence; for it requires a very discriminating judgment to listen to evidence for one purpose, but to pay no regard to it for another.

#### SECTION XIV. *Weight of evidence derived from the confession of the accused.*

With regard to the weight of evidence derived from the confession of a prisoner, a great difference of opinion exists. An eminent text-writer remarks, that where a confession is voluntary, "it is one of the strongest proofs of guilt; for it cannot be supposed, that a person really innocent would voluntarily subject himself to infamy and punishment." 2 Starkie on Evidence (London ed. 1842) 36. And in a later edition of the same work, it is said: "A full confession of guilt, although it be but presumptive evidence, is one of the surest proofs of guilt, because it rests upon the strong presumption that no innocent man would sacri-

fice his life, liberty, or even his reputation, by a declaration of that which was untrue. The presumption immediately ceases as soon as it appears that the supposed confession was made under the influence of threats or of promises, which render it uncertain whether the admissions of the accused resulted from a consciousness of guilt, or were wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or of punishment." 1 *Star-kie Ev.* (London ed. 1853) 73. Another text-writer, highly commended by Lord Mansfield C. J. says, "that magistrates cannot be too cautious in receiving confessions, as they very rarely flow from a conscientious desire to offer reparation for the injury committed, but are generally made, either under an implied or express promise of favor, if not extorted by threat or through fear." 1 *Burn's Justice*, 566, Chetwynd's ed. Another writer, who had much experience in the administration of criminal law, says: "This kind of evidence I have always found, in the words of that truly learned judge Sir Michael Foster, to be the most suspicious of all testimony." Chetwynd, for many years Chairman of County Sessions.

Mr. Justice Grose in delivering the opinion of the Judges in *Lambe's Case*, 2 *Leach C. C.* (4th ed.) 552, says, that confessions of guilt, made by a prisoner to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are, at common law, received in evidence, as the highest and most satisfactory proof of guilt, because it is fairly presumed, that no man would make such a confession against himself, if the facts confessed were not true. The case of *Rex v. Simmons*, 6 *Carrington & Payne*, 541, affords a strong instance of the caution with which jurors ought to receive parol evidence of what a prisoner is, alleged to have said in the way of confession. It was proposed to give in evidence what the prisoner, who was charged with a capital offence, had been overheard saying to his wife, as he was leaving the magistrate's room after committal; one witness stated, he overheard the prisoner say to his wife: "Keep yourself to yourself, and don't marry again." Another witness was called to confirm this evidence, who overheard, at the same time, what the prisoner said, and stated the words to be: "Keep yourself to yourself, and keep your own counsel." Alderson B. remarked: "One of these expressions is widely different from the other; it shows how little reliance ought to be placed on such evidence." Another judge, Mr. Justice J. Parke, has more than once observed, that too great weight ought not to be attached to evidence of what one has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say. 5 *Carrington & Payne*, 542 note to the case of *Earle v. Picken*.

In *Crossfield's trial* for high treason, 56 *Howell State Trials*, 108, Mr. Adam, speaking of the evidence of confession, observes, "that it is very doubtful in its nature, to be taken with great consideration on all occasions, as a proof of fact or intention. If a fact is proved by an eye-witness, that fact is proved provably, as distinguished from probably; it is proved to the full extent of legal demonstration, because if the witness speaks truth, the fact must be true. But when evidence is given of confession, observe what the nature of it is; the person who

gives the testimony may speak truth, and yet the fact may not be true, because the fact does not depend merely upon the statement of another person, who has stated the thing to the witness. This doctrine makes it fit to receive with great deliberation, and even with considerable hesitation and doubt; all evidence of confession. Confessional evidence is such, that the person making the declaration must yet be led by hope on the one hand, or fear on the other, to state circumstances that may make in his favor; and the mind which is to receive the confession, the person to whom it is made, must have an accurate, distinct understanding, capable of carrying it away with precision, of reporting faithfully without exaggeration or misrepresentation. In all evidence of confession, the nature of it is such, that it is next to impossible to convict for perjury on account of such testimony. What is the security offered by the law, that witnesses shall speak truth in a court of justice? That they come under the terror of a penal prosecution if they do not. A witness, who comes to speak to a confession comes to give evidence to that which, from the very nature of it, cannot be negatived, because it is impossible to swear that a person did not say such or such a thing; all that can be said by a witness is negatively that he did not hear him say it; consequently the person who speaks to the declaration, gives his testimony without those risks of penal proceeding — he is safe from the restraints and terrors of the law."

Blackstone says of this species of evidence that, even in cases of felony, at the common law, "confessions are the weakest and most suspicious of all testimony — ever liable to be obtained by artifice, false hopes, and promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence." So Foster, in speaking of prosecutions for seditious words, says, "words are transient and fleeting as the wind — they are frequently the effect of sudden transport, easily misunderstood, and often misreported."

But whatever difference of opinion exists in respect of the weight which ought to be attached to evidence derived from a confession, yet where it is admissible and satisfactorily proved, it is deemed sufficient by the highest authorities in the English law to convict a prisoner even capitally, without the aid of any corroborative testimony of his having committed the offence with which he is charged. 3 Russell on Crimes, 365, 366, 4th ed. This rule has been adopted in Georgia, *Stephen v. The State*, 11 Georgia, 225, and in North Carolina, *The State v. Cowan*, 7 Iredell, 239. But in the United States it has been held that the prisoner's confession, when the corpus delicti is not otherwise proved, is insufficient to warrant his conviction. *The State v. Long*, 1 Haywood, 455. *The State v. Guild*, 5 Halsted, 163, 185. 1 Greenl. Ev. § 217. In *United States v. Williams*, 1 Clifford, 5, this question was fully discussed, and Mr. Justice Clifford, at p. 29, concludes his opinion as follows: "The cases referred to are sufficient to show the state of the law in the United States, and it will be seen that they do not sustain the doctrine that the corpus delicti must be fully proved by evidence independent of the confession. It is doubtful whether Mr. Greenleaf intended to lay down any such rule, and if he did we are not prepared to adopt it, as it does not appear to have the sanction of any decided case either in England or the United States. All that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confes-

sion; and where such evidence is introduced, it belongs to the jury, under the instructions of the court, to determine upon its sufficiency." See *Stringfellow v. The State*, 26 Mississippi, 157; *Brown v. The State*, 32 Mississippi, 433, 450; *Bergen v. The People*, 17 Illinois, 426; *The State v. Aaron*, 1 Southard, 231. And see *Commonwealth v. Tarr*, 4 Allen, 315; *Commonwealth v. McCann*, 97 Massachusetts, 580.

In *Falkner and Bond's Case*, Russell & Ryan C. C. 481, there was no evidence of the fact of the felony except the confession of the prisoner; and the only other evidence in the case was to the effect that the prisoner had been desirous to send a message to the prosecutor to keep him away from the trial. In *Tippet's Case* there was no positive evidence that the property had been actually stolen, but there was confirmatory evidence making the theft probable. Most of the Judges were of opinion that the jury might have convicted the prisoner upon his confession unconfirmed. Russell & Ryan C. C. 509, Easter term 1823. See also *White's Case*, Russell & Ryan C. C. 508, decided in the same term, where the evidence was almost the same. In *Wheeling's Case*, 1 Leach C. C. (4th ed.) 311 note, it is said to have been decided by Lord Kenyon C. J. that a prisoner may be convicted upon his confession, uncorroborated by any other evidence.

In a modern text-book, Roscoe's *Criminal Evidence* by Granger (ed. 1840) p. 35, *Eldridge's Case*, Russell & Ryan C. C. 440, is cited as establishing the same proposition. But on reference to that case it will be found that there was confirmatory evidence. The prisoner was indicted for stealing a mare, which was seen on the 9th of October, with the prosecutor's servant. On the 11th of the same month it was not in the prosecutor's possession. On the 13th, the prisoner took the mare to the house of the witness, saying he had been robbed of all his money, and he asked the witness for a feed of corn. The witness detained the mare for the amount of the feed and other things. The prisoner then offered to sell the mare for £35, which appeared to be a fair value, but he afterwards sold her to another for £12, and a few shillings, the expenses. The Judges met in Easter term 1821 and were of opinion that there was sufficient evidence to confirm the confession. The same discrepancy of opinion as to the weight of this species of evidence seems to exist on the American Bench. In the case of *The Corporation of Columbia v. Harrison*, 2 Reports of the Constitutional Court (N. S.) at p. 215, Nott J. says: "A voluntary confession is, in most cases, the highest evidence that can be given." In the case of *The State v. Long*, 1 Haywood, 455, a confession is spoken of as "from the very nature of the thing, a very doubtful species of evidence." In *Keithler v. The State*, 10 Smedes & Marshall, 229, the court say: "A voluntary confession is entitled to but little weight, as it is but natural that one accused of crime should endeavor to palliate his guilt by excuses."

In another case, *The State v. Fields*, 1 Peck, 140, the court said: "The evidence of such confessions is liable to a thousand abuses.<sup>1</sup> They are made by persons generally under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To

<sup>1</sup> The confession was admitted in evidence in this case. The prisoner, who was charged with murder, had previously offered to confess, and he was subsequently advised to do so.



disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, — in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, purpose and views momentarily changing, — a thousand plans alternating, and difficulties gathering into a multitude. How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and, for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning? For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity, or promises of favor, and of any influence, even the minutest."

A modern writer remarks on this subject, that "the imagination need not be taxed for extreme cases, in which silence, equivocation, or even falsehood, the ordinary badges of guilt, would naturally be found in company with perfect innocence. There are many instances in which the truth, properly brought to light, would set free the accused, but his very situation disqualifies him from doing justice to his own statement. Conscious of his rectitude, and proud of his character, he is abashed, humiliated, and confounded by the charge. The untoward chances that have loaded him with suspicion, may go on to his utter ruin; the false witnesses who have now established a *prima facie* case, may ultimately convince his judges. That he should ever become an object of accusation, would have struck him yesterday as more impossible, than that accusation should now lead to conviction. The last step seems far less violent than the first, and the commencement of his process is a fatal augury, which teaches him to despair of its issue." *Edinburgh Review*, Vol. 40, p. 188 (March 1824).

In the administration of the Ecclesiastical Law, great doubt seems to exist in regard to the force of confessions. Sir W. Scott says (*Williams v. Williams*, 1 Haggard, 304) that "the court must remember, that confession is a species of evidence, which, though not inadmissible, is regarded with great distrust. There is a canon particularly pointed against them, which says, *nec partium confession fides habeatur*; and though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on all occasions, to be most accurately weighed."

By the Civil Law, the confession of a party against himself is, in ordinary cases, considered a certain proof of the fact which he owns, unless the contrary truth is established in such a manner as that there might be reason to think that the confession is an effect of folly or stupidity in the person that confesses against himself, that which is false; but in accusations of capital crimes, it is not enough that the party which is accused confesses a crime which is not proved; but other proofs are necessary for putting him to death besides his own confession, which might be an effect of melancholy or despair, or proceed from some other cause than the force of truth. *Domat's Civil Law*, bk. 4, 658.

In a text-book the following case is mentioned as having occurred within the personal knowledge of the writer: Two brothers committed a highway robbery in a dark night, and fled. A younger brother, who was at home, and

innocent of the offence, hearing, the next day, that one of the other two was suspected, and, apprehending pursuit, used many artifices to induce a supposition that he was himself the guilty person. He was brought before a magistrate, and in his examination used many equivocal expressions, amounting, in substance, to a virtual confession, which however he refused to subscribe. He was committed for trial. On his trial he had no difficulty in proving an alibi on the clearest testimony, and obtaining an acquittal. The brothers, in the mean time, who had actually committed the robbery, had safely arrived in America with the plunder. Dickinson's Justice of Peace, I. 629 note.

"Upon the trial of Richard Coleman, at the Kingston Assizes, in March 1748-9, for the murder of Sarah Green, who had been brutally assaulted by three persons, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the name of Coleman, from which circumstance suspicion soon attached to the prisoner. A person deposed that he met the prisoner at a public house, and asked him if he knew the woman who had been so cruelly treated, and that he answered "yes — what of that?" The witness said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account: "Yes, I was, and what then?" Or, as another account states: "If I was, what then?" It appeared that the prisoner was intoxicated, and that the questions were put with a view of ensnaring him; but the jury, influenced by this imprudent and blamable language, convicted him, and he was executed. The real offenders were afterwards discovered, and two of them were executed for this very offence, the third having been admitted to give evidence for the Crown, and the innocence of Coleman was rendered indubitable." Remarkable Trials, I. 162. See also Celebrated Trials, IV. 344. The King v. Jones and Welsh. See also Harrison's Case cited 1 Leach C. C. (4th ed.) 264 note; 2 Howell State Trials, 1049; 4 Howell State Trials, 817; 6 Howell State Trials, 647; 8 Howell State Trials, 1017.

"Whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, these cases should never be invoked, or so urged as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions, which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is unprofessional and impolitic, and should be regarded as offensive to the intelligence both of the court and jury." Hoffman's Course of Legal Study, Vol. I. pp. 367, 368.

It appears inaccurate to give to all kinds of confessions the same confidence, or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shades of certainty and probability, from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, suspicious, or doubtful expressions.

With respect to the whole of this subject, Lord Campbell C. J. observed in *Regina v. Baldry*, ante p. 498, "If the matter were *res integra*, I should perhaps have doubted whether it might not have been advisable to allow the confession to be given in evidence and to let the jury give what weight to it they pleased."

"No doubt this would, for the interests of truth, be the best rule," says a recent writer on the Criminal Law.<sup>1</sup> "There are however other interests to be considered, of which one of the most important is the popularity of the law. It must not be forgotten that the poor and ignorant are the persons most affected by the administration of criminal justice; and the ministers of justice, with whom they have most to do, the police, have just that amount of intellectual and social superiority to day laborers, and the lower class of mechanics, which makes them the objects of peculiar jealousy, and renders it desirable to take special precautions against abuses of their power. Their rough and ignorant zeal would frequently lead them into acts of real oppression, if the law of evidence were altered so as to make such oppression useful. It must also be remembered that to require the legal punishment, even of a criminal, is no light thing. It is not less important that the sympathies of the community should go with the punishment, and all concerned in its infliction, than that the crime should be punished; and this would not be the case if evidence obtained by threats or promises were admitted, unless, at the same time, those who have made use of the threats or promises were punished, which it would be practically very difficult to do. For these reasons it would perhaps be wise not only to maintain the rule, but to extend it to cases of confession, extorted by spiritual terrors, or obtained by fraud."

<sup>1</sup> Stephen "A General View of the Criminal Law of England," p. 323. 1863.

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## ADULTERY.

1. Parties to the crime of adultery may be jointly indicted. *Commonwealth v. Elwell* . . . . . 290
2. An indictment which alleges that P. M., on a certain day and at a certain place, "did commit the crime of adultery with one M. S., by then and there having carnal knowledge of the body of said S., she the said S. then and there being a married woman, and having a husband alive," is not sufficient to support a conviction. These allegations do not show, with certainty, that M. S. was not the wife of P. M. *Moore v. The Commonwealth* . . . . . 284
3. It is not necessary, in an indictment against an unmarried man for adultery with a married woman, under Rev. Sts. of Massachusetts, ch. 130, § 1, to aver that he knew, at the time when the offence was committed, that she was a married woman. Nor is it necessary to prove such knowledge on the trial. *Commonwealth v. Elwell* . . . . . 290

## AIDER BY VERDICT.

1. The prisoner was charged in the first count, "that she in and upon a certain infant female child born of the body of her the said S. W. and of tender age, to wit, of about the age of two days, and not named," feloniously made an assault, &c. and caused to take poison, and so murdered her.
- In the second count, "that the said S. W. in and upon the said infant female child so born of the body of her the said S. W. and not named as aforesaid, &c. feloniously did make an assault, and that she, the said S. W., the said infant female child in and upon a heap of ashes, &c. wilfully, &c. did cast, &c. and did then and there leave the said infant female child, &c. in the open air, &c. exposed to the cold air, &c. of which said exposure and of the chilling thereby caused, the said infant female child then and there died, and so the jurors aforesaid, &c.
- Held*, 1. That there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot.
2. That the words "said infant female child so born of the body of her the said S. W." did not incorporate by reference the description of the child given in the first count; namely, that it was of tender age.
  3. That the second count was, therefore, defective in not showing that the child was unable to take care of itself.
  4. That had the act of the prisoner charged in that count been a

non-feasance, the indictment would have been bad after verdict.

5. That as it was a misfeasance, and the death of the child was alleged to have been caused thereby, the defective statement in the indictment must be taken to be supplied by the verdict.

*Regina v. Waters* . . . . . 152

2. After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count.

*Regina v. Waverton* . . . . . 157

### ATTEMPT.

What acts amount to an attempt to commit a crime . . . . . 171

### ATTEMPT TO COMMIT LARCENY BY STEALING FROM THE PERSON.

1. In an indictment for an attempt to commit a larceny from the person of an individual by picking his pocket, it is not necessary to allege or prove, that such party, at the time of the attempt, had any thing in his pocket, which could be the subject of larceny. *Commonwealth v. McDonald* . . . . . 474

2. There can only be an attempt to commit an act, when there is such a beginning as, if uninterrupted, would end in the completion of the act. *Regina v. Collins* . . . . . 478

The prisoner was indicted for attempting to commit a felony by putting his hand into A.'s pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket; but there was no proof that there was any thing in the pocket.

*Held*, that, on the assumption that there was nothing in the pocket, the prisoner could not be convicted of the attempt charged . . . . . *Ibid*

### "A TRUE BILL."

The omission of the words "A true bill," does not vitiate an indictment.

*The State v. Freeman* . . . . . 250

### "BAILEMENT."

Defined . . . . . 198 note

### "BARILLA."

The word "barilla" is good in an indictment, to denote the subject of larceny. *Commonwealth v. James* . . . . . 181

### BIGAMY.

Indictment for. *Murray v. The Queen* . . . . . 288

*BRITAIN v. KINNAIRD*, 1 *BRODERIP & BINGHAM*, 432; 4 *MOORE*, 50.

A case which "has been oftener recognized than almost any modern case." . . . . . 330 note.

## BURGLARY.

I. *Indictment.*

1. On an indictment for burglariously breaking and entering a dwelling-house, and then and there stealing goods therein, but omitting to state the intent, the prisoner may well be convicted of the burglary, if the larceny be proved, but not otherwise. *Rex v. Furnival* . . . . 122  
*Jones v. The State* . . . . . 123
2. And in such case, it is not necessary to allege an intent to steal; as proof of the larceny is sufficient evidence of the intention . . . . *Ibid*
3. According to Lord Hale, there are five distinct allegations, — each of which are essential to an indictment for burglary: —
  1. That it is said noctanter in the night-time, or nocte ejusdem diei, in the night of the same day, for if it be in the daytime it is not burglary 126
  2. That it be said burglaritèr, burglariously, for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or circumlocution . . . . . 129
  3. It must be fregit et intravit, “broke and entered,” for it is held, that breaking without entering, or entering without breaking, makes not burglary . . . . . 131
  4. It must be said domum mansionalem, the dwelling or mansion house, where burglary is committed in a house, and not generally domum, for that is too uncertain, and at large . . . . . 131
  5. It must be alleged that the prisoner committed a felony in the same house, or that he broke and entered the house to the intent to commit a felony . . . . . 139

II. *Actual and Constructive Breaking.*

4. The pulling down the sash of a window which has no fastening, and is only kept in its place by a pulley weight, is a sufficient breaking to constitute burglary. *Rex v. Haines* . . . . . 43
5. It is equally a breaking, although there is an outer shutter which is not closed and fastened . . . . . *Ibid*
6. Lifting the flap of a cellar usually kept down by its own weight, is a sufficient breaking for the purposes of burglary. *Rex v. Russell* . . 44
7. The getting the head out through a skylight is sufficient breaking out of a house to constitute burglary. *Rex v. M'Kearney* . . . . . 62

See CHURCH.

## BURDEN OF PROOF.

In order to render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement; if this appear doubtful on the evidence, the confession ought to be rejected.

*Regina v. Warringham* . . . . . 487 *note.*

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## CHARACTER.

1. Meaning of the term "character" . . . . .	351
2. Erskine's definition of. . . . .	335
3. If evidence of good character is given on behalf of a prisoner, evidence of bad character may be given in reply ( <i>hæsitante</i> MARTIN B.). <i>Regina v. Rowton</i> . . . . .	333
4. But ( <i>dissentientibus</i> ERLE C. J. and WILLES J.) in either case the evidence must be confined to the prisoner's general reputation; and the individual opinion of the witness as to his disposition, founded upon his own experience and observation, is inadmissible . . . . .	<i>Ibid.</i>
5. <i>Regina v. Burt</i> , 5 Cox C. C. 284, overruled . . . . .	<i>Ibid.</i>
6. Character of the person on whom the offence was committed . . . . .	355
7. Character when admissible as evidence of probable cause for arresting a person on suspicion that he had committed a felony . . . . .	357

## CHURCH.

Burglary may be committed in a church at common law. But it is not necessary to allege that a church is a mansion-house, for burglary in a church is a distinct burglary of itself . . . . . 132, 133

## COMPOUNDING OFFENCES.

1. The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. <i>Keir v. Leeman</i> , in the Court of Queen's Bench. . . . .	216
2. Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff, and riot, and of an action for wrongful levy under a <i>fi. fa.</i> , which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the <i>fi. fa.</i> is altogether invalid, as grounded on an illegal consideration . . . . .	<i>Ibid.</i>
3. Although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial . . . . .	<i>Ibid.</i>
4. In an action of <i>assumpsit</i> , it appeared that plaintiff had indicted several persons for riot and assault upon a constable in the execution of his duty, and upon others aiding him, and for simple assaults; which offences were alleged to have been committed in impeding the execution of a <i>fi. fa.</i> issued by plaintiff against the goods of one of the persons indicted. Defendants (being third parties), in consideration that plaintiff would, at their request, not further prosecute, promised to pay the balance in the original action remaining unsatisfied; and	

likewise the costs of the prosecution. Plaintiff, in consideration thereof, with the assent of the judge before whom the prosecution was, at the assizes, forbore to prosecute further.

On demurrer to pleas which set out the indictment, and which, in answer severally to counts charging the different promises, relied upon the illegality of the contract:

*Held*, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the consideration was unlawful, and that no action could be maintained on any of the promises. *Keir v. Lee-man* . . . . . 221

5. A promissory note, given for compounding a public prosecution for a misdemeanor, is founded upon an illegal consideration. *Jones v. Rice* 239

### CONSPIRACY.

1. Indictment for a conspiracy to extort money. One account averred that defendants, in pursuance of a conspiracy to extort money from the prosecutor, *falsely* exhibited certain indictments against him; another count averred that defendants, in pursuance of the like conspiracy, offered to suppress an indictment pending against the prosecutor if he would give them money for so doing. The jury found the defendants guilty, generally, but found, specially, that the indictments, preferred by them against the prosecutor, were not *false*: *Held*, that the averment in the former count was immaterial, and that the latter count would support the conviction. *The King v. Hollingberrg.* . . . . 34
2. *Held also*, that a conspiracy to extort money is per se an offence at common law, and need not be charged to be attempted by unlawful means . . . . . *Ibid.*

### CONFESSIONS.

1. In order to render a confession by a prisoner admissible, the prosecution must show affirmatively, to the satisfaction of the judge, that it has not been made under the influence of an improper inducement; if this appear doubtful on the evidence, the confession ought to be rejected. *Regina v. Warringham* . . . . . 487 *note*.
2. A confession is not admissible in evidence where it is obtained by temporal inducement, by threat, promise, or hope of favor held out to the party, in respect of his escape from the charge against him, by a person in authority, or where there is reason to presume, that such person appeared to the party to sanction such threat or inducement . . . . . 572
3. A police constable, who apprehended a man on a charge of murder, having told him the nature of the charge against him, said "he need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him." The prisoner thereupon made a confession. *Held*, that the confession was rightly admitted in evidence. *Regina v. Baldry* . . . . . 484
4. *Regina v. Drew*, 8 Carrington & Payne, 140; *Regina v. Morton*, 2

- Moody & Robinson, 514; *Regina v. Furley*, 1 Cox C. C. 76; and *Regina v. Harris*, 1 Cox C. C. 106, are overruled . . . . . *Ibid.*
5. M. J., suspected of having committed felony, was followed and stopped by a constable in plain clothes. The constable having told M. J. what he was, and that she (M. J.) was charged with felony, proceeded to put several questions to her, relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions the constable had not told M. J. that she was under arrest, "but he would not have let her go." He did not expressly hold out any threat or inducement to M. J.; nor did he, before she answered him, give her any caution. M. J. having answered the questions, the constable then told her she was not bound to say any thing that would criminate herself; and said he should bring her to the police office.
- Held*, by eight Judges, that the conversation between M. J. and the constable was receivable in evidence; and, by three Judges, that it was not so receivable. *The Queen v. Johnston* . . . . . 504
6. The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions. *Regina v. Moore* . . . . . 499
7. On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible. *Regina v. Warringham* 487 *note*.
8. A confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a person not in authority over the prisoner . . . . . 584
9. A confession is admissible, although it is elicited by questions put to a prisoner by a magistrate, constable, or other person . . . . . 591
10. A confession is admissible, although it is elicited in answer to a question which assumes the prisoner's guilt, or is obtained by artifice or deception . . . . . 595
11. A confession is admissible where it is induced by spiritual exhortation or persuasion to confess, not held out with any view of temporal benefit . . . . . 598
12. A statement not compulsory, made by a party, not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath . . . . . 604
13. Where a confession has been obtained, or inducement been held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible in evidence, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled . . 607
14. A confession may be inferred from the conduct and demeanor of a

- prisoner, when a statement is made in his presence, affecting himself, unless such statement is made in the deposition of a witness, or examination of another prisoner, before a magistrate . . . . . 611
15. Where a confession is not admissible, from the circumstances under which it was obtained, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances, but any act of such party, though done in consequence of such confession, is admissible in evidence, if it appears from a fact thereby discovered, that so much of the confession as immediately relates to it, is true . . . . . 615
16. Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible, although such statement neither appears in the written examination, nor is vouched by the magistrate; and a confession before a magistrate is admissible, although it was made before the evidence of the witnesses against the parties was concluded . . . . . 619
17. Parol evidence of a confession made during an examination before a magistrate, is admissible in evidence, although it was taken down in writing by the magistrate, if from informality the written examination is not admissible; and such examination, though informal, may be used to refresh the memory of a witness who was present and took it down . . . . . 622
18. Weight of evidence derived from the confession of the accused . . . 624

“CRIME.”

- Meaning of the word . . . . . 353

DYING DECLARATIONS.

1. If a dying declaration is tendered in evidence, and its admissibility rest upon the fact that the deceased believed, when he made it, that he was at the point of death, the question whether this fact be satisfactorily proved must be determined by the judge. *Rex v. John* . . . . . 393
2. If it may reasonably be inferred from the nature of the wound, the state of illness, and other circumstances, that the deceased was sensible of his danger, his declarations are admissible . . . . . *Ibid.*
3. Defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending the defendant shot the prosecutor, and, on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose:  
*Held*, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. *The King v. Mead* . . . . . 394

ERSKINE.

- His definition of the term “character” . . . . . 335

## EVIDENCE.

1. To prove the guilty knowledge of an utterer of a forged bank-note, evidence may be given of his having previously uttered other forged notes, knowing them to be forged. *The King v. Wylie* . . . . . 26
2. If several acts of felonious taking property, are so connected as to form one transaction, evidence of each taking may be received against the prisoner, so as to establish the specific felony charged in the indictment. *The King v. Ellis* . . . . . 18, 32
3. It is a general rule, which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of an offence punishable by law, and for which he may by law be convicted on that indictment. *The King v. Hollingberry* . . . . . 34
4. The rule applies where an indictment contains *divisible* averments . . 40
5. In like manner, if a *compound intent*, or several intents, be laid in the indictment, and if one part of the compound intent, or each of the several intents when coupled with the act done, constitute an offence, it will not be necessary to prove the whole as laid . . . . . 40
6. Averments charging defendants with a joint offence are divisible, where the offence is of such a nature as that the defendants may act a different part in the transaction; and if the evidence affects them differently, the judge may select such parts as are applicable to each, and leave their cases separately to the jury. . . . . 41, 42
7. Where several persons cannot be convicted of distinct felonies which are charged in the indictment as a joint felony, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted . . . . . 42
8. Upon an indictment for an assault upon E. E., it is sufficient to prove that an assault was committed upon a person bearing that name, although it appear that two persons bore the same name, E. E. the elder and E. E. the younger. *The King v. Peace* . . . . . 247

## "EXCEPTION."

Meaning of the word . . . . . 13, 14, *note*.

## "EXTORT."

Meaning of the word . . . . . 37, 38

## FORGERY.

Description of forged instruments in the indictment . . . . . 100

## FALSE PRETENCES.

The prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence. *Regina v. Gardner* . . . . . 163

# FIGURES.

It is error in an indictment to express numbers or dates by Arabic figures or Roman numerals; they must be written in words at length, except when the indictment, as in forgery, professes to set forth the exact tenor or a fac simile of any instrument. *Berrian v. The State* . . . . . 107

## FINDING OF LOST PROPERTY.

See LARCENY.

## GUILTY KNOWLEDGE.

On an indictment for knowingly uttering a forged document, or a counterfeit bank-note, or counterfeit coin, evidence of the possession, or of the prior or subsequent utterance, either to the prosecutor himself, or to other persons, of other false documents or notes, or bad money, though of a different description, and though themselves the subjects of separate indictments, is admissible as material to the question of guilty knowledge or intent. *The King v. Wylie* . . . . . 26, 30, 31

## HUSBAND AND WIFE.

See ADULTERER; WITNESS.

## INDICTMENT.

In an indictment every thing which the pleader should have stated, and which is not either expressly alleged, or by necessary implication included in what is alleged, must be presumed against him. *Moore v. The Commonwealth* . . . . . 284  
*Commonwealth v. Bean* . . . . . 172

The indictment must not only set out the tenor of a written instrument, but it must profess so to do. The word "tenor" imports an exact copy; that it is set forth in words and figures,—whereas the word "purport" means only the substance or general import of the instrument. . . . . 99

When the word "or" in a statute is used in the sense of "to wit," that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment, which adopts the words of the statute, is well framed. *Commonwealth v. Grey* . . . . . 150

A complaint or indictment averring an unlawful sale of "spirituous or intoxicating liquor," is bad for uncertainty. *Commonwealth v. Grey* . . 150

Any qualities or adjuncts averred to belong to any subject in one count of an indictment, if they are separable from it, shall not be supposed to be alleged as belonging to it in a subsequent count which merely introduced it by reference as the same subject "before mentioned." *Regina v. Waverton* . . . . . 157

The word "said" does not incorporate a previous description. *Rex v. Cheeve* . . . . . 156 note.

An indictment upon the Rev. Sts. of Massachusetts, ch. 126, § 42, for malicious destruction of glass, must aver the glass to be part of a

- building. An allegation that it was "in" a certain building is not sufficient. *Commonwealth v. Bean* . . . . . 172
- Whether or not an indictment should be signed by the foreman of the grand jury . . . . . 253
- The omission of the words "A true bill" does not vitiate an indictment. *The State v. Freeman* . . . . . 250
- See ABORTION; ADULTERY; BIGAMY; BURGLARY; PLEADING EXCEPTIONS AND PROVISOS IN STATUTES; WRITTEN INSTRUMENTS.
- Insanity Effect of in writing* 204
- JUDICIAL OFFICERS.

1. Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact *Calder v. Halket* . . . . . 308
2. The 21 Geo. III. ch. 70, § 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English courts of a similar jurisdiction, and only gives them an exemption from liability when acting bonâ fide in cases in which they have mistakenly acted without jurisdiction. . . . . *Ibid.*

#### JUSTICES OF THE PEACE.

1. A judge of an inferior court, acting in a case of which he has no jurisdiction, or exceeding his jurisdiction, is liable in damages to any party injured. *Piper v. Pearson* . . . . . 304
2. Thus a justice of the peace, who, in the course of the trial of a case of which a police court has exclusive jurisdiction, commits a witness to prison for contempt, is liable to an action by the witness. . . . . *Ibid.*
3. As the police court of Lowell has exclusive jurisdiction of all offences committed within that city, a record of a conviction, before a justice of the peace for the county of Middlesex, of an offence alleged to have been committed in the city of Lowell, shows primâ facie a want of jurisdiction in the justice . . . . . *Ibid.*
4. The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction. *Ibid.*

#### KNOWLEDGE.

1. A scienter is never necessary to be alleged, except when the crime is not complete, without some extrinsic circumstance within the prisoner's knowledge, as in cases of inciting a prisoner to escape, uttering a forged note or bill, and cases of that description, where, without the scienter, the act is free from guilt. . . . . 293
2. Where the statement of the act itself includes a knowledge of the act, no averment of knowledge is necessary. But where such is not the case, knowledge must be alleged and proved. . . . . 293
3. It is not necessary, in an indictment against an unmarried man for

adultery with a married woman, under Rev. Sts. of Massachusetts, ch. 130, § 1, to aver that he knew, at the time when the offence was committed, that she was a married woman, Nor is it necessary to prove such knowledge on the trial. *Commonwealth v. Elwell* . . . . . 290

4. As to what is a sufficient averment of knowledge . . . . . 297

# LARCENY.

1. Where a miller, having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris, it was held to be larceny. *Commonwealth v. James* . . . . . 181

2. The cases on actual and constructive possession are classed under the following heads:—

1. As to the cases where, by a delivery of the goods, not only the possession, but the right of property also, passes. . . . . 191  
[*Regina v. Prince*, 11 Cox C. C. 193.]

2. Where the possession of the goods has been obtained animo furandi . . . . . 192  
[*Regina v. Prince*, 11 Cox C. C. 193.]

3. As to the case where the possession of the goods has been obtained bonâ fide, without any fraudulent intention in the first instance . . . . . 197

4. As to cases, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him . . . 200  
[*Regina v. Deering*, 11 Cox C. C. 298.]

3. The bringing into the commonwealth of Massachusetts, by the thief, of goods stolen in one of the British Provinces, is not larceny in that commonwealth. *Commonwealth v. Uprichard* . . . . . 371

4. Stealing goods in another of the United States, formerly a colony of Great Britain, and bringing them into the commonwealth of Massachusetts, may be punished as larceny there. THOMAS, J. dissenting. *Commonwealth v. Holder* . . . . . 377

5. If a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he take them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. *Regina v. Thurborn* . . . . . 409

6. A. found a bank-note in the highway, and took it with intent to appropriate it to his own use. The note had no name or mark upon it by which he would know to whom it belonged, nor was there any circumstance attending the finding to enable him to know to whom it belonged. A. changed the note and appropriated the money to his own use, after he knew that it belonged to the prosecutor. Held, that he was not guilty of larceny . . . . . *Ibid.*

7. Where a bank-note is lost, and is found by a person who appropriates it to his own use: Held, that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved



to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny. *Regina v. Preston* . . . . . 417  
[*Regina v. Deaves*, 11 Cox C. C. 227.]

See ADULTERER; ATTEMPT TO COMMIT LARCENY BY STEALING FROM THE PERSON.

LIBEL.

The publisher of a Public Register receives an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the Register; after which he receives two letters in the same handwriting, directed as mentioned, and having the Irish postmark on the envelopes; which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed; this is a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the Register in Middlesex for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex. *The King v. Johnson* . . . . . 432

“MAINOUR.”

Defined . . . . . 440 note.

MALICIOUS MISCHIEF.

An indictment upon the Rev. Sts. of Massachusetts, ch. 126, § 42, for malicious destruction of glass, must aver the glass to be part of a building. An allegation that it was “in” a certain building is not sufficient. *Commonwealth v. Bean*. . . . . 172

MONOMANIAC.

See WITNESS.

MANSLAUGHTER.

The prisoner was convicted of manslaughter. The prisoner and the deceased were foreigners, and the latter died at Liverpool from injuries inflicted by the prisoner on board a foreign ship on the high seas. *Held*, that the offence was not cognizable by the law of England, and that the conviction was wrong. *Regina v. Lewis*. . . . . 298

NEGLIGENCE.

In cases of neglect of children of tender years, it must be both alleged and proved that the health was injured . . . . . 170  
[*Commonwealth v. Stoddard*, 9 Allen, 280.]

NEW TRIAL.

Where, upon the trial of an indictment for a misdemeanor, a witness examined before the grand jury was not examined at the trial, and a witness not examined before the grand jury was examined at the trial, this was not such a surprise upon the defendants as entitled them to a new trial. *The King v. Hollingberry* . . . . . 34

NISI PRIUS DECISIONS.

Entitled to little consideration . . . . . 570, 571

“OR.”

When the word “or” in a statute is used in the sense of “to wit,” that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment, which adopts the words of the statute, is well framed. *Commonwealth v. Grey* . . . . . 150

PERJURY.

1. In the following cases a living witness to the corpus delicti of a defendant, indicted for perjury, may be dispensed with, and documentary or written testimony be relied on to convict. Where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it. *United States v. Wood* . . . . . 67, 73
2. On an indictment for perjury in taking the owners' oath under the Act of Congress of March 1, 1823, § 4 (3 Statutes at Large, 730), it is not necessary for the prosecution to produce a living witness to testify to the falsehood of the fact sworn to; if the jury believe that the written evidence contained in the defendant's letters and in other documents recognized by him as genuine, proves he made a false and corrupt oath, he may be convicted . . . . . *Ibid.* 67
3. The prisoner was convicted of perjury. The prisoner, who was a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore on the hearing that he knew nothing of the matter except what he had been told, and that “*he did not see any person leave the defendant's house after eleven*” on the night in question. The perjury was assigned on this last allegation, and the evidence to prove its falsehood was as follows: The magistrate's clerk proved that the prisoner when laying the information said that he had seen four men leave the house after eleven, and that he could swear to

one as W. It was also proved that on two other occasions the prisoner made a similar statement to two other witnesses; that W. and others did in fact leave the house after eleven o'clock on the night in question; that on the hearing the prisoner acknowledged that he had offered to smash the case for 30s.; that he had talked in the presence of another witness of making the publican give him money to settle it; that he had in fact offered to the publican to settle it for 1l.; and had said that he had received 10s. to smash the case and was to have 10s. more.

*Held*, that the evidence was sufficient to prove the perjury assigned, and that the conviction was right. *Regina v. Hook* . . . . . 80

### PLEADING OF EXCEPTIONS AND PROVISOS IN STATUTES.

1. Where there is an exception so incorporated with the enacting clause of a statute, that the one cannot be read without the other, then the exception must be negatived. If the exception, by whatever phraseology indicated, is in a substantive clause, subsequent to the enacting clause, though it be in the same section, it is matter of defence to be shown by the defendants. *Commonwealth v. Hart* . . . . . 1
2. This rule is applicable in pleading instruments of contract . . . . . 8
3. In Massachusetts the St. 1852, ch. 322, § 12, contains only one exception in the enacting clause; namely, "without being appointed or authorized as aforesaid." At the end of the section, in a subsequent clause, is a proviso. An indictment which negatives the exception is sufficient. *Commonwealth v. Hart* . . . . . 1
4. And the words "not being then and there duly appointed and authorized therefor," is a sufficient allegation . . . . . 1 *note*.

### PRACTICE.

Affidavits are not admissible to aggravate punishment upon a conviction for felony. *The King v. Ellis* . . . . . 18

### "PROVISO."

Meaning of the word . . . . . 13, 14 *note*.

### "PURPORT."

Meaning of the word . . . . . 99, 100

### RAPE.

1. Definition of . . . . . 259
2. Having carnal knowledge of a married woman under circumstances which induce her to suppose it is her husband. *Held*, by a majority of the Judges, not to amount to a rape. *Rex v. Jackson* . . . . . 254
3. The prisoner had carnal knowledge of a married woman under circumstances which induced her to suppose he was her husband. The jury found that when he entered the bed of the prosecutrix he intended to have connection with her fraudulently, but not by force; and if de-

ted, to desist. *Held*, that the prisoner could not be convicted of a rape. *Regina v. Clarke* . . . . . 255

# RECORD.

The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction. *Piper v. Pearson* . . . . . 304

# RECEIVING STOLEN GOODS.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously received the said goods, knowing, &c. is bad as against A. B., but good against the receiver as for a substantive felony. *Regina v. Caspar* . . . . . 451

In an indictment for the substantive felony of receiving stolen goods, an allegation, that the goods were stolen "by a certain evil-disposed person," is good, without stating the name of the principal felon, or averring that he is unknown. *Rex v. Jervis* . . . . . 462 *note*.

# REMOTENESS.

The prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence. *Regina v. Gardner* . . . . . 163

# "SAID."

The word "said" does not incorporate a previous description. *Rex v. Cheever* . . . . . 156 *note*.

# "SUBSTANTIVE FELONY."

Meaning of the term . . . . . 464 *note*.

# "TAKEN WITH THE MANNER."

Meaning of the phrase . . . . . 440 *note*.

# "TENOR."

Meaning of the word. *Wright v. Clements* . . . . . 94, 99

# TRUE BILL.

The omission of the words "A true bill," does not vitiate an indictment. *The State v. Freeman* . . . . . 250

*Variance*

*ND*

# WITNESS.

1. Where two are jointly indicted for uttering a forged note, and the trial of one is postponed, he is not a competent witness for the other.  
*Commonwealth v. Marsh* . . . . . 260
  2. On an indictment against several prisoners, the wife of any of them is inadmissible as a witness. *Rex v. Smith* . . . . . 262
  3. On a question of settlement, the pauper having been removed to her maiden settlement, respondents called A. to prove her marriage with C., in order to get rid of the effect of a subsequent marriage of C. with the pauper.  
*Held*, that A. was a competent witness, for C. not having been called as a witness, she did not contradict him, and her evidence could not be used to criminate him. *The King v. All Saints, Worcester* . . . . . 266
  4. It is clear, with respect to witnesses not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension as freely as if the marriage was null . . . . . 273
  5. Where an objection is raised to the competency of a witness on the ground that he is insane, it is for the court to decide whether such person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and, in order to determine these questions, he may be examined and cross-examined, and witnesses on both sides may be examined, in order to found and to meet the objection to his competency, before he himself is sworn. *Regina v. Hill* . . . . . 204
- The question is, was the witness non compos mentis quoad hoc, or non compos mentis altogether. *ALDERSON B.* . . . . . *Ibid.*
- If the court decides that he is a competent witness, it is for the jury to determine whether his testimony is affected by insanity, and what degree of weight is to be attached to it . . . . . *Ibid.*

# WRITTEN INSTRUMENTS.

1. Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, in substance as follows; and then set out the libel with innuendoes: *Held*, that this was bad on motion in arrest of judgment. *Wright v. Clements* . . . . . 94
2. The word "tenor" imports an exact copy, and that the libel is set out in words and figures . . . . . *Ibid.*
3. But if the instrument be set out in hæc verba, a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable . . . . . 103
4. Where the instrument on which the indictment rests is in the defendant's possession, or cannot be produced, and there is no laches on the part of the government, it is necessary to aver in the indictment such facts as are sufficient to excuse the nondescription of the instrument, and then to proceed, either by stating its substance, or by describing

- it as an instrument which cannot be set forth by reason of its loss, destruction, or detention, as the case may be . . . . . 105
5. An indictment for printing an obscene paper must set it out in the very words of which it is composed; and the indictment must undertake or profess so to do, by the use of appropriate language, unless the publication is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but in this case, a reason for the omission must appear in the indictment, by proper averments. If one of the original printed papers, in an indictment for printing an obscene paper, is attached to the indictment, in place of inserting a copy, it is not a sufficient indication that the paper is set out in the very words . . . . . 106
6. In an indictment for a larceny of written instruments, made the subject of larceny by statute, it is sufficient to give a brief legal description of the instrument. Thus an indictment for larceny, alleging that the defendant stole "one bank-note of the value of ten dollars, of the property of one 'C. D.'" is sufficient without a more particular description of the note . . . . . 106











